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# Final Salute to Lost Soldiers: Preserving the Freedom of Speech at Military Funerals

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# Final Salute to Lost Soldiers: Preserving the Freedom of Speech at Military Funerals

## **Abstract**

This Comment argues that RAFHA, as currently written, cannot stand in light of First Amendment jurisprudence. Part I reviews the history and development of relevant free speech case law and restrictions on expression, including the recent trend in the states of passing legislation similar to RAFHA. Part II assesses the Act's constitutionality against this background. First, Part II contends that the statute is a content-based restriction of free speech and is thus subject to strict scrutiny. Second, even if deemed content neutral, the Act could not survive the courts' intermediate scrutiny. Finally, this Comment reasons that even if able to survive the above challenges, the Act is still unconstitutional under First Amendment case law because it provides for standardless prior restraint. This Comment concludes that RAFHA is an unconstitutional regulation of speech and should be challenged in court.

## **Keywords**

Respect for America's Fallen Heroes Act, Constitutionality of RAFHA, Free speech jurisprudence, Content-neutral restriction, Content-based restriction, Prior restraint

# A FINAL SALUTE TO LOST SOLDIERS: PRESERVING THE FREEDOM OF SPEECH AT MILITARY FUNERALS

ANDREA CORNWELL \*

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### INTRODUCTION

"Thank God for Dead Soldiers."<sup>1</sup> Hardly a typical Memorial Day tribute, protesters chanted and carried signs displaying this and other offensive statements near the Arlington National Cemetery entrance.<sup>2</sup> Standing in a closed-off area across a four-lane road, a few members of the Westboro Baptist Church—unaffiliated with any mainstream Baptist church—presented incredibly deplorable views.<sup>3</sup> They designed their demonstration to incite action, namely to reverse the United States' tolerance of homosexuality.<sup>4</sup> Although they succeeded in spurring action, Congress's response worked against the protesters' cause. That day, as the small group picketed and crowds of people came to remember fallen service members, President Bush signed into law the Respect for America's Fallen Heroes Act

1. Associated Press, *Anti-gay group protests at National Cemetery: Church group stages Memorial Day demonstration, prompting opposition*, MSNBC, May 29, 2006, <http://www.msnbc.msn.com/id/10663255/>.

2. See *id.* (listing other slogans written on the signs, including "God is America's terror," "You're going to hell," and "Bush killed them," and stating that the protesters also sang "God hates America" to the tune of "God Bless America").

3. See *id.* (noting that, because a line of police cars and noisy traffic across a four-lane highway separated protesters and military supporters, the two groups could not hear each other, but held signs to express their views); Brian Goodman, *Funeral Picketers Sued by Marine's Dad*, CBSNEWS.COM, July 28, 2006, <http://www.cbsnews.com/stories/2006/07/27/national/main1843396.shtml> (stating that the Phelps family founded the Westboro Baptist Church in 1955, but that the Church has no affiliation with mainstream Baptist churches despite its name).

4. See Goodman, *supra* note 3, ("Our job . . . is to put this cup of his wrath and fury to the lips of this nation and make them drink it." (quoting Shirley Phelps-Roper, spokeswoman, Westboro Baptist Church)); see also Ann Rostow, *Marine's parents sue anti-gay Phelps clan*, PLANETOUT NEWS, June 5, 2006, <http://www.planetout.com/news/article.html?2006/06/05/5> (explaining that the Westboro Baptist Church's leader, Rev. Fred Phelps, protests funerals because he believes that "God is punishing the United States for the country's gay-friendly policies").

(“RAFHA” or “the Act”),<sup>5</sup> essentially prohibiting demonstrations within three hundred feet of any national cemetery, including Arlington. Yet, even this could not discourage the Westboro Baptist Church from speaking out. One month later, the group returned to protest twenty-five year-old Army First Lieutenant Forrest Ewens’s funeral.<sup>6</sup> As grieving family and friends laid Lieutenant Ewens to rest, those protesters discounted his sacrifice as punishment for America’s policies regarding homosexuality.<sup>7</sup>

While expression such as this is, to say the least, difficult to tolerate, especially by the families of fallen soldiers, First Amendment jurisprudence nonetheless requires that we permit such speech. Last year’s RAFHA,<sup>8</sup> however, restricts demonstrations on or near Arlington National Cemetery or any cemetery under the control of the National Cemetery Administration (“NCA”).<sup>9</sup> This statute

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5. 38 U.S.C.A. § 2413 (West 2006).

6. See WashingtonPost.com, Faces of the Fallen, <http://projects.washingtonpost.com/fallen/dates/2006/jun/16/forrest-p-ewens/> (last visited Feb. 22, 2007) (listing individual deceased soldiers and their age at time of death, hometown, cause of death, etc.); Goodman, *supra* note 3 (explaining that the Westboro Baptist Church has taken its “love crusades” to military funerals nationwide, including that of Lt. Ewens).

7. See Goodman, *supra* note 3 (explaining that the Church believes God is punishing America by killing soldiers because of this country’s tolerance of homosexuality).

8. 38 U.S.C.A. § 2413. The text of the Act reads in part:

(a) Prohibition. No person may carry out—

(1) a demonstration on the property of a cemetery under the control of the National Cemetery Administration or on the property of Arlington National Cemetery unless the demonstration has been approved by the cemetery superintendent or the director of the property on which the cemetery is located; or

(2) with respect to such a cemetery, a demonstration during the period beginning 60 minutes before and ending 60 minutes after a funeral, memorial service, or ceremony is held, any part of which demonstration —

(A)(i) takes place within 150 feet of a road, pathway, or other route of ingress to or egress from such cemetery property; and

(ii) includes, as part of such demonstration, any individual willfully making or assisting in the making of any noise or diversion that disturbs or tends to disturb the peace or good order of the funeral, memorial service, or ceremony; or

(B) is within 300 feet of such cemetery and impedes the access to or egress from such cemetery.

9. *Id.* Although 38 C.F.R. § 1.218 (2006) and 32 C.F.R. § 553.22(f) (2006) set out quite similar rules of behavior explicitly prohibiting disturbing conduct and distributing pamphlets for all Veterans Affairs facilities, including those under the NCA’s control, and Arlington National Cemetery respectively, this Comment only assesses the constitutionality of RAFHA. Moreover, this Comment does not address The Respect for the Funerals of Fallen Heroes Act, legislation that would go beyond RAFHA’s current limitations to ban protests at any military funeral, wherever it occurs. See Press Release, Sen. Dick Durbin, Durbin’s *Respect for the Funerals of Fallen Heroes Act* Headed to President to be Signed Into Law (Dec. 11, 2006), *available at*

prohibits certain expression within 300 feet of the cemetery and 150 feet of any road, pathway, or other route leading into the cemetery from one hour before until one hour after every funeral.<sup>10</sup> Restricted conduct includes picketing, orating, and displaying flags when such expression is not part of the funeral, memorial service, or ceremony.<sup>11</sup>

This Comment argues that RAFHA, as currently written, cannot stand in light of First Amendment jurisprudence. Part I reviews the history and development of relevant free speech case law and restrictions on expression, including the recent trend in the states of passing legislation similar to RAFHA. Part II assesses the Act's constitutionality against this background.<sup>12</sup> First, Part II contends that the statute is a content-based restriction of free speech and is thus subject to strict scrutiny. Second, even if deemed content neutral, the Act could not survive the courts' intermediate scrutiny. Finally, this Comment reasons that even if able to survive the above challenges, the Act is still unconstitutional under First Amendment case law because it provides for standardless prior restraint. This Comment concludes that RAFHA is an unconstitutional regulation of speech and should be challenged in court.

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<http://durbin.senate.gov/record.cfm?id=266834&&>. This Act was passed by both houses in early December 2006. *Id.*

10. 38 U.S.C.A. § 2413(a).

11. *Id.* § 2413(b)(1)-(3).

12. This Comment only examines the statute's constitutionality within the purview of the First Amendment. One might argue that the statute also violates procedural due process under the Fourteenth Amendment because the statute does not give adequate guidance to those subject to the law and is thus overly vague. Readers interested in finding more on this issue are directed to *Musser v. Utah*, 333 U.S. 95, 97 (1948) ("Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused."), and *Grayned v. City of Rockford*,

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

408 U.S. 104, 108-09 (1972).

# I. BACKGROUND: FREE SPEECH JURISPRUDENCE AND THE DEVELOPMENT OF SPEECH RESTRICTIONS IN THE STATES

RAFHA arrives against the background of a long history of First Amendment cases,<sup>13</sup> as well as recent enactments of similar speech restrictions in quite a few states.<sup>14</sup> The first section of Part I describes the relevant free speech jurisprudence, focusing on those issues that would reappear in a constitutional challenge of the Act. The second section provides a brief study of similar state laws prohibiting speech near cemeteries and the lawsuits filed challenging those laws.

## A. Free Speech Jurisprudence: A Review of Relevant Case Law

The First Amendment to the U.S. Constitution prohibits Congress from making laws abridging the freedom of speech.<sup>15</sup> In considering speech restrictions, the Supreme Court addresses several independent but related considerations. To begin, the Court must identify in which forum the regulated speech would take place.<sup>16</sup> Next, the Court classifies the restriction as either content based or content neutral.<sup>17</sup> Depending on this determination, the Court assesses the regulation's constitutionality under either strict or intermediate scrutiny.<sup>18</sup> The Court also considers whether the restriction grants unbridled discretion to a state official.<sup>19</sup>

13. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 411-12 (1989) (discussing content-based speech restrictions); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772 (1988) (holding that laws providing for standardless prior restraint by government officials violate the First Amendment); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (identifying three types of forum relevant to speech restrictions under the First Amendment); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (asserting that certain speech, such as fighting words, is unprotected by the First Amendment).

14. See *infra* notes 107-111 and accompanying text (discussing state statutes similar to RAFHA).

15. U.S. CONST. amend. I.

16. See Robert D. Nauman, *The Captive Audience Doctrine and Floating Buffer Zones: An Analysis of Hill v. Colorado*, 30 CAP. U. L. REV. 769, 774 (2002) (explaining that the Court identifies the forum, another consideration in the Court's analysis, before deciding which standard of scrutiny to use); Alan Phelps, Note, *Picketing and Prayer: Restricting Freedom of Expression Outside Churches*, 85 CORNELL L. REV. 271, 280 (1999) (explaining that in cases of "relatively peaceful picketing, courts first pay attention to the location protesters choose to deliver their message rather than the message itself").

17. See Nauman, *supra* note 16, at 770-76 (describing the Court's traditional approach to restrictions of First Amendment rights, including first determining the forum, then the standard of scrutiny based on whether the law is content based or content neutral).

18. See *id.* at 774-76 (explaining that, in public fora, content-based laws are subject to strict scrutiny while content-neutral laws receive intermediate scrutiny).

19. See, e.g., *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757-59 (1988) (finding that because a content-based law that required newspapers to

*1. Determining the forum*

Forum is a classification assigned to a certain location for purposes of assessing constitutional obligations under the First Amendment.<sup>20</sup> The Supreme Court recognizes the existence of three types of fora: the traditional public forum, designated public forum, and nonpublic forum.<sup>21</sup> The Court characterizes the traditional public forum as one that has been immemorially reserved for public use, including citizens' assembly, communication, and discussion.<sup>22</sup> This includes places such as streets, sidewalks, and parks, which may never be closed by the government to all public discourse.<sup>23</sup> A designated public forum, on the other hand, is one that has not traditionally served these purposes, but instead has been opened by the government to the public for assembly and expression.<sup>24</sup> Examples of the designated public forum include school board meetings<sup>25</sup> and municipal theaters.<sup>26</sup> The government may silence public speech and expression in a designated public forum, but not in a traditional public forum.<sup>27</sup> In these two types of public fora, content-based

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continually reapply for a periodic license would logically result in self-censorship, it was facially unconstitutional).

20. See Nauman, *supra* note 16, at 774 (explaining that the level of expression allowed in a particular forum, and thus the amount of leeway given to the government, depends on the nature of the forum) (citations omitted).

21. See *id.* at 774-75 (discussing the forum analysis in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)).

22. See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (explaining that a traditional public forum has "immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"); Nauman, *supra* note 16, at 775 (defining a traditional public forum as "a forum devoted to assembly and debate by tradition" and supporting his statement with the above quotation from *Hague*).

23. See Nauman, *supra* note 16, at 775 (noting that this characteristic truly distinguishes a traditional public forum from the other two types of fora) (citing *Hague*, 307 U.S. at 515).

24. See *infra* notes 134-135 and accompanying text (explaining that if the government elects to allow public access to the property, it takes on the same qualities as a traditional public forum).

25. See, e.g., *City of Madison Joint Sch. Dist. v. Wisc. Employment Relations Comm'n*, 429 U.S. 167, 174-77 (1976) (holding that school board meetings are designated public fora, in part because these are public meetings and decreeing the meetings to be nonpublic would essentially eliminate communication between teachers and their government).

26. See, e.g., *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (finding that a municipal theater was a public forum because it was "designed for and dedicated to expressive activities").

27. See Nauman, *supra* note 16, at 775 (finding that the principal difference between a designated public forum and traditional public forum is that the government may limit speech and expression in the former, but not in the latter).



restrictions would be subject to strict scrutiny, while content-neutral restrictions need only meet intermediate scrutiny.<sup>28</sup>

In a nonpublic forum, on the other hand, speech restrictions are subject to mere rational basis review and must not intend to silence only one opinion.<sup>29</sup> This is because nonpublic fora, such as prisons,<sup>30</sup> military bases,<sup>31</sup> and school mail systems,<sup>32</sup> are closed to public communication.<sup>33</sup>

Although it appears that the Supreme Court has never addressed the issue of forum as it applies to municipal cemeteries,<sup>34</sup> several lower courts have attempted to do so and all classified cemeteries as nonpublic fora.<sup>35</sup> In *Warner v. City of Boca Raton*,<sup>36</sup> the U.S. District Court for the Southern District of Florida found that “it seems quite obvious that cemeteries are nonpublic fora” since, above all, they are a place for citizens to bury and respect the dead, not to promote public debate.<sup>37</sup> In *Griffin v. Secretary of Veterans Affairs*,<sup>38</sup> the Court of Appeals for the Federal Circuit relied on *Warner*, assuming for purposes of that case that Veterans Affairs cemeteries are nonpublic

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28. See *id.* (explaining that in nonpublic fora, content-based restrictions face a low standard of scrutiny since the government has considerable leeway in restricting speech, but in public fora, content-based restrictions face strict scrutiny, while content-neutral restrictions face intermediate scrutiny) (citations omitted).

29. See *id.* at 775-76 (describing a nonpublic forum as one that is not required to allow free public communication and explaining that in order to survive there, a speech restriction must only be rationally related to a legitimate government interest, though it cannot be content based) (citations omitted).

30. See *Adderley v. Florida*, 385 U.S. 39, 44-48 (1966) (holding that a sheriff lawfully arrested members of a student assembly at a county jail because the property was closed to the public and the crowd’s removal served a security purpose).

31. See *Greer v. Spock*, 424 U.S. 828, 837-38 (1976) (holding that military bases are nonpublic fora because their essential function of providing common defense for the nation depends on the commanding officer’s power to exclude civilians).

32. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (holding that a school mail system is a nonpublic forum because it is not open to the general public, but intended for intraschool communication, despite unaffiliated organizations’ sporadic use of the system).

33. See Nauman, *supra* note 16, at 775-76 (explaining that, even though the government controls nonpublic fora, it is not obligated to allow free speech there) (citation omitted).

34. See *Warner v. City of Boca Raton*, 64 F. Supp. 2d 1272, 1290 (S.D. Fla. 1999) (admitting that the court was unaware of any precedential case identifying a municipal cemetery’s forum).

35. See *Griffin v. Sec’y of Veterans Affairs*, 288 F.3d 1309, 1322 (Fed. Cir. 2002) (assuming that cemeteries owned by the Department of Veterans Affairs are nonpublic fora for purposes of the court’s First Amendment analysis because of the parties’ stipulation); *Warner*, 64 F. Supp. 2d at 1291 (identifying a public cemetery as a nonpublic forum).

36. 64 F. Supp. 2d 1272.

37. *Id.* at 1291.

38. 288 F.3d 1309.

fora.<sup>39</sup> Finally, in *Koehl v. Resor*,<sup>40</sup> the U.S. District Court for the Eastern District of Virginia did not classify the cemetery but held that “[a] national cemetery is a *public place* so clearly committed to other purposes that their use for the airing of grievances is anomalous.”<sup>41</sup> Whereas the district courts used strong, unsupported language such as “clearly” and “obvious” to support their classification,<sup>42</sup> the court of appeals seemed to hesitate, resting its assumption on the fact that neither party disputed the classification or presented evidence to the contrary.<sup>43</sup> As addressed in these cases, the issue of forum is hardly resolved with regard to municipal cemeteries.

*2. Determining whether the restriction is a content-based or content-neutral time, place, and manner restriction*

Depending on a statute’s language, courts apply either strict or intermediate scrutiny.<sup>44</sup> Where a regulation explicitly distinguishes between favored and disfavored speech based on the ideas expressed, courts nearly always find the regulation content based.<sup>45</sup> Sometimes, however, statutes are not overtly biased, but discriminate among messages under a veil of seemingly neutral language.<sup>46</sup> Therefore, courts also look to legislative history and ask whether the restriction applies equally to all protesters regardless of viewpoint.<sup>47</sup> In

39. See *id.* at 1322 (finding that where no party challenged the forum classification, the court could accept the stipulated classification).

40. 296 F. Supp. 558 (E.D. Va. 1969).

41. *Id.* at 562 (emphasis added).

42. *Supra* notes 37, 41 and accompanying text.

43. See *Griffin*, 288 F.3d at 1322 (explaining that both the parties and other courts agreed that public cemeteries are nonpublic fora).

44. See *Texas v. Johnson*, 491 U.S. 397, 403 (1989).

If the State’s regulation is not related to expression, then the less stringent standard we announced in *United States v. O’Brien* for regulations of noncommunicative conduct controls . . . . If it is, then we are outside of *O’Brien*’s test, and we must ask whether this interest justifies Johnson’s conviction under a more demanding standard.

(citations omitted).

See also Nauman, *supra* note 16, at 772-73 (identifying the different standards of review for each type of speech). The Court has admitted that determining the content neutrality of a speech restriction can sometimes be difficult. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (“Deciding whether a particular regulation is content based or content neutral is not always a simple task.”).

45. See *Turner Broad. Sys.*, 512 U.S. at 643 (adding that, in contrast, a law that burdens or benefits speech without regard to the expressed ideas is almost always content neutral).

46. See *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981) (distinguishing the first-come, first-served restriction in controversy from covertly content-based restrictions on the grounds that this restriction left no opportunity for suppressing a particular viewpoint).

47. See *Hill v. Colorado*, 530 U.S. 703, 719-20 (2000) (relying on legislative history to support the conclusion that the regulation there was not adopted “because of disagreement with the message it conveys” (quoting *Ward v. Rock Against Racism*,

determining whether a regulation is content based or content neutral, then, the Court's inquiry is driven by the governmental purpose in creating the regulation.<sup>48</sup>

The Court asks "whether the government has adopted a regulation of speech because of disagreement with the message it conveys."<sup>49</sup> Even if a regulation affects only certain speakers, the Court will nonetheless deem it content neutral where it serves a purpose unrelated to the content of the expression.<sup>50</sup> In *Ward v. Rock Against Racism*, the Supreme Court found that controlling noise levels at music events to avoid excessively disturbing other park and residential areas was "justified without reference to the content of the regulated speech."<sup>51</sup> However, in *Boos v. Barry*,<sup>52</sup> the Court deemed a regulation prohibiting the display of signs critical of foreign governments near their embassies a content-based restriction on political speech because it forbade only one type of speech, while permitting all others.<sup>53</sup> Relying on *Boos* in *Texas v. Johnson*,<sup>54</sup> the Court likewise found a regulation banning flag desecration to be content based, as it restricted political expression because of the content of the protester's message.<sup>55</sup> There, the law criminalized burning a flag in protest, but did not regulate burning a flag to respectfully dispose of it according to tradition.<sup>56</sup>

Once the Court has determined whether or not the regulation is content based, it continues its analysis by applying the appropriate

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491 U.S. 781, 791 (1989)); *Turner Broad. Sys.*, 512 U.S. at 642 (explaining that a content-based purpose is sometimes sufficient to demonstrate that the regulation is content based, but is not always required); *Boos v. Barry*, 485 U.S. 312, 325 (1988) (supporting the Court's finding that a regulation was content neutral with legislative history that illustrated the legislature's concern with the restriction's effect on free speech). But see *United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive . . . . Inquiries into congressional motives or purposes are a hazardous matter.").

48. See *Rock Against Racism*, 491 U.S. at 791 ("The government's purpose is the controlling consideration.").

49. *Id.* (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984)); see Nauman, *supra* note 16, at 773 (identifying this question as "the principal inquiry as to whether a regulation is content based").

50. *Id.* (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986)).

51. *Id.* (quoting *Cmty. for Creative Non-Violence*, 468 U.S. at 293) (internal quotations omitted) (emphasis added).

52. 485 U.S. 312 (1988).

53. See *id.* at 318-19 (noting that the regulation permitted "[o]ther categories of speech . . . such as favorable speech about a foreign government or speech concerning a labor dispute with a foreign government").

54. 491 U.S. 397 (1989).

55. See *id.* at 411-12 (explaining that because the restriction on expression was content based, it must be subjected to a strict scrutiny analysis).

56. See *id.* at 411 (suggesting that, had the defendant burned the flag in order to dispose of it because it was soiled or ripped, he never would have been prosecuted).

standard of scrutiny. In public fora, content-based restrictions are assessed using strict scrutiny, while content-neutral restrictions receive the Court's intermediate scrutiny.<sup>57</sup> To survive strict scrutiny, a regulation of speech must be a necessary means for serving a compelling state interest.<sup>58</sup> To survive intermediate scrutiny, the regulation must be narrowly tailored to serve a significant government interest<sup>59</sup> while leaving open ample alternative channels of expression.<sup>60</sup>

*a. Content-based restrictions*

Where the government has regulated speech simply because it disagrees with the speaker's message, the Supreme Court finds that restriction to be content based.<sup>61</sup> The Court presumes that content-based regulations are invalid because the government cannot simply grant some, but deny others, the use of a public forum based on whose views it finds acceptable and whose expression it deems controversial.<sup>62</sup> Nevertheless, the Court has found some forms of expression, such as "fighting words" and obscenity, to be unprotected under the First Amendment.<sup>63</sup> This is because the Court considers that such expression has no social value, or merely communicates an intent to commit a violent and unlawful act.<sup>64</sup> For example, the government may regulate fighting words to avoid a breach of the peace where such expression is: (1) directed at an individual or small

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57. See Nauman, *supra* note 16, at 775-76 (describing the three types of fora and explaining that in the first two, both within the public realm, the Court applies strict scrutiny to content-based regulations and intermediate scrutiny to content-neutral ones, whereas in a nonpublic forum, the Court applies a single, rational basis standard).

58. See *infra* note 68 and accompanying text (articulating this strict standard).

59. See *Ward v. Rock Against Racism*, 491 U.S. 781, 798-800 (1989) (finding that the city's concern over preventing excessive noise was effectively achieved through a regulation requiring a city sound technician).

60. *Id.* at 791.

61. See *supra* notes 48-50 and accompanying text (summarizing the Court's inquiry into the government's purpose when analyzing free speech restrictions).

62. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.") (citations omitted); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (explaining that because "[t]he essence of . . . forbidden censorship is content control" government may not grant or deny the use of a forum based on the content of speech).

63. See, e.g., *Miller v. California*, 413 U.S. 15, 24-25 (1973) (establishing a three-pronged test for determining whether material is "obscene" and therefore unprotected under the First Amendment); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-74 (1942) (holding that fighting words, which incite a breach of the peace, have hardly any social value and thus are unprotected under the First Amendment).

64. See *Virginia v. Black*, 538 U.S. 343, 358-59 (2003) (discussing the different types of expressive conduct proscribable under the First Amendment, including fighting words and true threats).

group; (2) inherently likely to invoke a violent response; and (3) “no essential part of any exposition of ideas.”<sup>65</sup> Likewise, certain regulations allowing harsher sentencing for hate crimes do not violate the First Amendment because they primarily serve to regulate conduct, not speech.<sup>66</sup> Statutes regulating unprotected speech are therefore permitted to be content based.

In applying the most “exacting scrutiny”<sup>67</sup> to content-based regulations of protected speech, the Court asks whether the government has proven that the restriction is a necessary means for achieving a compelling state interest.<sup>68</sup> The Court has found that having an undisrupted school session conducive to students’ learning<sup>69</sup> and maintaining public safety<sup>70</sup> qualify as compelling state interests. Nonetheless, it is quite rare that a state interest is deemed sufficiently compelling to justify a content-based regulation of speech.<sup>71</sup>

Finally, the Court considers whether the regulation is sufficiently narrowly tailored to serve the compelling governmental interest.<sup>72</sup> Often, courts look to another factor—whether less restrictive alternatives exist—to determine whether a regulation is narrowly

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65. *Chaplinsky*, 315 U.S. at 572, 574 (defining fighting words as those “epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace”); see *Cohen v. California*, 403 U.S. 15, 20 (1971) (finding that vulgar language on a jacket did not constitute fighting words because the words were not directed at a particular individual nor displayed to intentionally provoke a violent reaction).

66. See *Wisconsin v. Mitchell*, 508 U.S. 476, 484-88 (1993) (holding that a statute providing for enhanced punishment for race-based hate crimes was constitutional since it was a regulation of physical conduct, namely assault, which is neither expressive nor protected under the First Amendment); cf. *Black*, 538 U.S. at 363 (holding that a law prohibiting cross-burning was constitutional because such conduct was a form of intimidation meant to threaten violence and thus unprotected under the First Amendment). But cf. *R.A.V.*, 505 U.S. at 391 (finding an ordinance outlawing certain symbolic actions, including cross-burning, viewpoint specific and thus unconstitutional because it only punished such conduct when based on the disfavored subjects of “race, color, creed, religion or gender”).

67. *Boos v. Barry*, 485 U.S. 312, 321 (1988).

68. See *id.* (citing a string of cases for the proposition that the state must show that the “regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end” (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983))); Nauman, *supra* note 16, at 773 (“The government then must prove that the means are necessary to achieve a compelling state interest in order for the restriction to survive.”).

69. See *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972) (upholding an anti-noise ordinance prohibiting disruptive protests and picketing near school grounds).

70. See *Chaplinsky*, 315 U.S. at 574 (upholding a law prohibiting offensive or annoying language in public since such “fighting words” would lead to a breach of the peace, something the government has a compelling interest in preventing).

71. See *Bartnicki v. Vopper*, 532 U.S. 514, 548 (2001) (Rehnquist, C.J., dissenting) (recognizing that the strict scrutiny standard is often fatal).

72. See *Boos*, 485 U.S. at 322 (addressing whether the law in question serves a compelling governmental interest after having decided that the law applied in a public forum, was content based, and was thus subject to strict scrutiny review).

tailored.<sup>73</sup> In *Boos*, the Court assumed that there was a sufficiently compelling interest in restricting political speech on streets surrounding embassies and consulates, yet still found the regulation facially invalid because it was not narrowly tailored to serve that interest.<sup>74</sup> The *Boos* Court looked to a similar, less restrictive District of Columbia law to demonstrate that such alternatives exist, thus invalidating the federal statute.<sup>75</sup>

*b. Content-neutral restrictions*

Despite the strict protections afforded speech in public fora, one's right to free speech is not totally without limitation. The Court has repeatedly held that, even in a public forum, the government may restrict expression in time, place, or manner, so long as the restrictions are unrelated to the content of the expression and pass intermediate scrutiny.<sup>76</sup>

First, the Court inquires whether the restrictions are narrowly tailored to serve a significant governmental interest.<sup>77</sup> The Court has held that the government has a substantial interest in protecting its citizens from unwelcome noise in their homes<sup>78</sup> and physical or emotional harm when seeking medical care.<sup>79</sup> To be considered narrowly tailored, the regulation must "promote[] a substantial government interest that would be achieved less effectively absent the regulation."<sup>80</sup> In *Rock Against Racism*, the Court found that the government interest in controlling noise levels was directly and

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73. See *id.* at 324-27 (comparing the District of Columbia law with an analogous, less restrictive federal law and holding that the federal law's existence and legislative history supported a finding that the governmental interest in the District of Columbia law was insufficiently compelling).

74. See *id.* (holding that because Congress enacted a less restrictive federal speech regulation, but then imposed a more restrictive regulation in Washington, D.C., the restriction was not narrowly tailored).

75. See *id.* at 325-27 (comparing the federal statute with the District of Columbia law).

76. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)) (explaining the requirements of such time, place, and manner regulations, as well as the considerations of intermediate scrutiny).

77. See *Rock Against Racism*, 491 U.S. at 791 (listing the factors of an intermediate scrutiny analysis).

78. See *id.* at 796 (explaining that such an interest is valid because it closely relates to maintaining parks as in *Community for Creative Non-Violence*, 468 U.S. at 296, and protecting tranquility and privacy at home as in *Frisby v. Schultz*, 487 U.S. 474, 484 (1988)).

79. See *Hill v. Colorado*, 530 U.S. 703, 715-18 (2000) (finding that by offering this protection, the state maintains unobstructed access to health clinics).

80. *United States v. Albertini*, 472 U.S. 675, 689 (1985).

effectively served by the requirement that the city's own sound technician handle the volume controls.<sup>81</sup>

Likewise, in certain picketing cases, the Court has deemed "buffer zones" narrowly tailored where the distance was reasonable.<sup>82</sup> A buffer zone can be either fixed or floating. In *Schenck v. Pro-Choice Network of Western New York*,<sup>83</sup> the Court deemed reasonable a fixed buffer zone prohibiting demonstrations within fifteen feet of abortion clinic entrances.<sup>84</sup> In *Hill v. Colorado*,<sup>85</sup> the Court found that a floating buffer zone, requiring picketers within one hundred feet of an abortion clinic to keep a minimum eight-foot distance from patients entering the clinic, was narrowly tailored to serve the state interest in protecting privacy and access to medical facilities.<sup>86</sup>

Finally, the Court asks whether the restrictions leave open ample alternative channels of expression.<sup>87</sup> This does not, however, mean that the alternatives must be the least restrictive or least intrusive means of restricting speech.<sup>88</sup> In *Frisby v. Schultz*,<sup>89</sup> the Court found that an ordinance prohibiting picketing in front of someone's home nonetheless left ample alternative channels for communication, such as going door-to-door, marching through the neighborhoods, and contacting residents by phone or mail.<sup>90</sup>

### 3. *Standardless prior restraint*

A prior restraint is not unconstitutional per se, but where no standards regulate such discretion, there is a heavy presumption of unconstitutionality.<sup>91</sup> The Court has repeatedly invalidated licensing statutes entrusting government officials with standardless discretion

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81. See *Rock Against Racism*, 491 U.S. at 801 (finding that without the requirement the city would have received many complaints, thus diserving the government's interest).

82. See *Hill*, 530 U.S. at 726-27, 729 (comparing the eight-foot buffer zone in that case to the fifteen-foot zone in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 377 (1997), and finding that the regulation was "an exceedingly modest restriction on the speakers' ability to approach").

83. 519 U.S. 357 (1997).

84. *Id.* at 380-81; see also Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 600-01 (2006) (explaining that although the Court invalidated the floating buffer zone for being overly broad, it upheld the fixed buffer zone).

85. 530 U.S. 703.

86. See *id.* at 719-20 (upholding the restriction because, in addition to being narrowly tailored, it also was content neutral and regulated action, not speech).

87. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

88. *Hill*, 530 U.S. at 726 (citation omitted).

89. 487 U.S. 474 (1988).

90. See *id.* at 484 (agreeing with appellants that such alternatives were sufficient).

91. See *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) (explaining that in order to prove the constitutionality of a prior restraint, the government bears the burden of showing that certain safeguards are present).

over whether to permit or deny expressive conduct out of fear that such discretion may result in censorship.<sup>92</sup> In *City of Lakewood v. Plain Dealer Publishing Co.*,<sup>93</sup> the Court provided several reasons for prohibiting such unbridled discretion. First, because citizens are unsure whether the official will grant them the right to disperse their message, permitting standardless discretion encourages self-censorship.<sup>94</sup> If exercise of discretion is standardized, the Court suggests, the added certainty would eliminate self-censorship.<sup>95</sup> Second, without standards, it is difficult to distinguish between legitimate reasons for denial and biased applications of the law.<sup>96</sup> Finally, challenging an illegitimate denial is difficult and timely and thus likely would discourage challenges to the licensor's discretion.<sup>97</sup>

To prevent such abuses, the Supreme Court has invalidated standardless prior restraint, but has approached content-based and content-neutral regulations differently.<sup>98</sup> For content-based regulations of speech, the Court applies a three-pronged test to the prior restraint provision: (1) the restraint can only be imposed for a specified brief period so as to preserve the status quo; (2) the law must guarantee prompt and final judicial determination; and (3) the burden of instituting judicial proceedings and proving that the expression is unprotected must fall on the official.<sup>99</sup> Content-neutral regulations containing prior restraint provisions, on the other hand, must only contain sufficient standards to guide the official's decision and provide for judicial review.<sup>100</sup>

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92. See *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-57 (1988) (explaining that the Court has consistently granted standing to anyone subject to a law where prior restraint is permitted, even if they have not attempted to obtain a license).

93. 486 U.S. 750 (1988).

94. See *id.* at 757-58 (asserting that standards prevent self-censorship by limiting discretion).

95. See *id.* at 757 (elaborating that "unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused").

96. See *id.* at 758 (finding that without standards, licensors can create post hoc rationalizations to justify their decision for denying a license).

97. See *id.* at 758-59 (explaining that difficulties of proof and case-by-case examinations required in such lawsuits leave the speaker's message unheard and make the licensor's action impossible to review).

98. See *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 321-23 (2002) (holding that content-based regulations, but not content-neutral regulations, are required to meet procedural safeguards).

99. See *id.* at 321 (citing *Freedman v. Maryland*, 380 U.S. 51, 52, 57 (1965)) (listing the three safeguards developed in *Freedman*, a case involving a prior restraint on film licensing); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561 (1975) (reaffirming the *Freedman* safeguards).

100. See *Thomas*, 534 U.S. at 323 (explaining that time, place, and manner regulations are held to a lower standard).



While the Supreme Court has never addressed this issue in the context of cemetery rules, two lower courts have. Although both courts treated the municipal cemeteries as nonpublic fora, each adopted a different approach in analyzing the issue of prior restraint.<sup>101</sup> In *Warner v. City of Boca Raton*,<sup>102</sup> the Southern District of Florida found unconstitutional a regulation permitting the cemetery manager to make standardless exceptions to any cemetery rule.<sup>103</sup> On the other hand, in *Griffin v. Secretary of Veterans Affairs*,<sup>104</sup> the Federal Circuit held that undefined discretion vested in the superintendent of Arlington National Cemetery was constitutional for two reasons. First, the court reasoned that the presumption of unconstitutionality is weaker in nonpublic fora and, since municipal cemeteries are nonpublic fora, the regulations sufficiently rebutted the lower standard.<sup>105</sup> Second, the court asserted that, in light of the nature and function of the cemetery, vesting standardless discretion in the facility head was reasonable.<sup>106</sup>

*B. Legislation and Litigation: The Recent Trend in States*

Some states have long had laws regulating activity at funerals to ensure a respectful burial for the deceased and a peaceful place to mourn for the deceased's friends and family.<sup>107</sup> As the Westboro Baptist Church began picketing military funerals with signs praising the deaths of fallen soldiers, however, states responded with more stringent regulations. By the end of May 2006, at least thirteen states

101. See *supra* notes 35-43 and accompanying text (reviewing lower courts' decisions and reasoning for finding cemeteries to be nonpublic fora).

102. 64 F. Supp. 2d 1272 (S.D. Fla. 1999).

103. See *id.* at 1292-93 (holding that a regulation prohibiting vertical grave decorations except upon approval from the cemetery manager was standardless and provided opportunity for discrimination between speech, thus violating the First Amendment).

104. 288 F.3d 1309 (Fed. Cir. 2002).

105. See *id.* at 1322-23 (asserting that, by its terms, the prior restraint doctrine does not apply to nonpublic fora).

106. See *id.* at 1324 (finding that national cemeteries were established by the Department of Veterans Affairs to serve as "national shrines . . . to our gallant dead" and for the government's own expressive purposes).

107. See, e.g., CAL. CODE REGS. tit. 14, § 594.35(d) (2006) (prohibiting "[d]isturb[ing], obstruct[ing], detain[ing] or interfer[ing] with any person carrying or accompanying human remains to a cemetery or funeral establishment, or engaged in a funeral service, or an interment"); CAL. SENATE COMM. ON PUB. SAFETY, 2000 BILL SUMMARY: MEASURES SIGNED AND VETOED, S. 1999-2000, 1059-S, at 120 (2000), available at <http://www.sen.ca.gov/ftp/sen/committee/standing/publicsafety/bills/billsummary2000.pdf> (explaining that section 594.35 would replace a health and safety regulation prohibiting certain acts of destruction and vandalism to cemeteries).

had passed laws similar to the more restrictive RAFHA,<sup>108</sup> while many others were considering such laws.<sup>109</sup> In fact, RAFHA encouraged states to pass similarly strict laws,<sup>110</sup> and since President Bush signed the bill into law in May 2006, several states have done just that.<sup>111</sup>

The American Civil Liberties Union ("ACLU") has initiated lawsuits challenging the Missouri, Ohio, and Kentucky laws.<sup>112</sup> The ACLU brought all three lawsuits on similar bases, so examining only the Kentucky law and corresponding lawsuit provides an adequate look at the challenges' foundations.<sup>113</sup> The Kentucky law creates a

108. See Associated Press, *Blagojevich Signs Funeral Protest Bill*, CBS2CHICAGO.COM, May 17, 2006, [http://cbs2chicago.com/local/local\\_story\\_137154351.html](http://cbs2chicago.com/local/local_story_137154351.html) (reporting that Illinois enacted a law similar to RAFHA in mid-May 2006); Ronald L.L. Collins & David L. Hudson, Jr., *A Funeral for Free Speech?*, LEGAL TIMES, Apr. 17, 2006, at 66 (noting that as of April 2006, Arkansas, Indiana, Kentucky, Missouri, Nebraska, Oklahoma, South Dakota, Virginia, and Wisconsin had passed such laws); Ashley Rowland, *Protesters to picket soldier's funeral*, CHATTANOOGA TIMES FREE PRESS, Sept. 23, 2006 (comparing the Tennessee law passed in spring 2006 with the challenged Kentucky law); Press Release, Minn. State Rep. Philip Krinkie, Legislative Update from Rep. Phil Krinkie, May 17, 2006, <http://www.house.leg.state.mn.us/members/pressreleases84.asp?district=53A&pressid=1404&party=2> (reporting that Minnesota Governor Pawlenty signed a bill similar to RAFHA into law in mid-May 2006); Press Release, SEIU Michigan State Council, Under the Dome Capitol Update, Feb. 10-May 24, 2006, <http://www.seiumi.org/news/press.cfm?pressReleaseID=1842> (choose year "2006" then follow "Under the Dome May 25, 2006" hyperlink) (reporting that this bill was signed into law on May 24, 2006).

109. See Collins & Hudson, Jr., *supra* note 108, at 66 (claiming that in April of 2006 at least twenty states were considering such laws).

110. H.R. 5037, 109th Cong. § 4 (2d Sess. 2006) ("It is the sense of Congress that each State should enact legislation to restrict demonstrations near any military funeral.").

111. See, e.g., South Carolina Legislature Online, H.4965, Gen. Assem., 116th Sess. (S.C. 2006), available at [http://www.scstatehouse.net/cgi-bin/web\\_bh10.exe?bill=4965&session=116&summary=T](http://www.scstatehouse.net/cgi-bin/web_bh10.exe?bill=4965&session=116&summary=T) (last visited Mar. 11, 2007) (reporting that, even after the governor vetoed the bill, the legislature overwhelmingly succeeded in overriding the veto in June 2006); Michael Sangiacomo, *Legislators go to court to back Rest in Peace Act*, THE PLAIN DEALER (Cleveland), Sept. 12, 2006, at B10 (reporting that the Ohio governor signed the Rest in Peace Act into law on September 4, 2006). Kansas, the Westboro Baptist Church's home state, recently passed a similar law in April 2007. See Associated Press, *Kansas governor signs legislation against anti-gay picketing at soldiers' funerals*, IHT.COM, Apr. 12, 2007, <http://www.iht.com/articles/ap/2007/04/12/America/NA-GEN-US-Funeral-Picketing.php#> (reporting that the law prohibits protesting within 150 feet of a funeral during, or for one hour before or two hours after, the ceremony). Fearful that the WBC would challenge the law's constitutionality, however, the legislature stipulated that the law will not take effect until the state supreme court or a federal court deems the law constitutional. *Id.*

112. Complaint, *Phelps-Roper v. Nixon*, No. 06-4156-CV-C-NKL (W.D. Mo. 2006), available at <http://www.aclu-em.org/downloads/PhelpsCOMPLAINTFINAL.pdf>; Complaint, *McQueary v. Stumbo*, No. 3:06-CV-00024 (E.D. Ky. 2006), available at [http://www.aclu.org/images/asset\\_upload\\_file568\\_25439.pdf](http://www.aclu.org/images/asset_upload_file568_25439.pdf); Sangiacomo, *supra* note 111, at B10 (reporting that the ACLU of Ohio filed suit within several days of enactment of the law).

113. See Sangiacomo, *supra* note 111 (reporting that the ACLU is challenging the law on grounds of overbreadth); Press Release, American Civil Liberties Union of Eastern Missouri, Funeral Protest Challenge, <http://www.aclu-em.org/pressroom/20>

300-foot radius around any funeral, funeral procession, memorial service, or ceremony within which congregating, picketing, and demonstrating are completely prohibited.<sup>114</sup> Additionally, unless the deceased's family or the person conducting the service approve, the statute prohibits activities such as singing, whistling, using sound amplification equipment, and displaying images within earshot or eyesight of participants in the service.<sup>115</sup> The ACLU of Kentucky, representing a Kentucky resident and Westboro Baptist Church supporter, is challenging that state's law on several grounds, including its overbreadth and provision permitting standardless prior restraint.<sup>116</sup> On September 26, 2006, the district court judge issued a preliminary injunction suspending the law's enforcement so as to avoid irreparable injury to the plaintiff during the trial.<sup>117</sup> The court found that the law was content neutral and served a significant governmental interest, but was not narrowly tailored.<sup>118</sup>

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06pressreleases/72106acluchallengeslawbann.htm (reporting that the ACLU of Eastern Missouri had filed suit for Shirley Phelps-Roper, the Westboro Baptist Church's spokeswoman, against the Missouri Governor and Attorney General, as well as the county's prosecuting attorney on grounds of overbreadth and vagueness and asserting that the law is content based and does not serve a valid government interest); *Kentucky: A.C.L.U. Backs Pickets at Funerals*, N.Y. TIMES, May 2, 2006, at A16 (reporting that the ACLU filed suit to challenge the law in part for its overbreadth).

114. See H.B. 333 § 5(1)(b), 2006 Gen. Assem., Reg. Sess. (Ky. 2006).

115. See H.B. 333 § 5(1)(c), 2006 Gen. Assem., Reg. Sess. (Ky. 2006).

116. Complaint, *McQueary v. Stumbo*, No. 3:06-CV-00024 (E.D. Ky. 2006), available at [http://www.aclu.org/images/asset\\_upload\\_file568\\_25439.pdf](http://www.aclu.org/images/asset_upload_file568_25439.pdf). First, the plaintiff alleged that the law is an unconstitutional prior restraint on speech and a content-based regulation that is not narrowly tailored to serve a significant government interest. *Id.* at 4. Second, he claimed that the statute contains "overbroad criminalizations of speech" because the radius is too large and the law criminalizes more speech than needed to avoid disruption to the funeral service. *Id.* at 1, 5 (noting that simply entering onto land or congregating within three hundred feet of a funeral would hardly disrupt the service, yet such activity would be punished under the law). Third, the plaintiff claimed that it is impermissible for a private party to have the authority to permit certain speech and expression, while denying others, on public property. *Id.* at 5. Finally, the plaintiff alleged that the law is overbroad "in that it forbids singing, chanting, or displaying images on public property, even if not disruptive, simply because it occurs within earshot or eyesight of funeral participants." *Id.*; see H.B. 333 § 5(1)(c)(1). At the time this Comment was completed, none of the three courts had reached a final result.

117. See *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 997-98 (E.D. Ky. 2006) (order granting preliminary injunction) (finding that while the injunction would serve the public interest and not cause substantial injury to others, it would cause irreparable injury to the plaintiff).

118. See *id.* at 992, 997 (holding that the law is unconstitutionally overbroad because, although it was content neutral and served the state's legitimate interest in prohibiting interference with funerals, it restricted more speech than necessary).

## II. ASSESSING THE CONSTITUTIONALITY OF THE RESPECT FOR AMERICA'S FALLEN HEROES ACT

RAFHA is unconstitutional under the First Amendment for several reasons. First, it is viewpoint specific and discriminates between speech based on content. As noted above, content-based regulation of speech is presumptively invalid<sup>119</sup> and would not pass strict scrutiny. Second, even if deemed content neutral and thus assessed under intermediate scrutiny, the Act could not stand constitutional muster because it is not narrowly tailored, does not serve a government interest and does not leave ample alternative means for expression. Finally, even if the statute survives intermediate scrutiny, it nevertheless provides for standardless prior restraint,<sup>120</sup> which is constitutionally impermissible under First Amendment jurisprudence.<sup>121</sup>

### *A. The Respect for America's Fallen Heroes Act Restricts Speech Occurring in Both Designated and Traditional Public Fora*

The Supreme Court's first step in analyzing any speech-restricting statute is to determine which of the three fora the regulation addresses.<sup>122</sup> Here, the statute regulates speech both on cemetery property<sup>123</sup> and any roads, paths, and routes of ingress and egress.<sup>124</sup> More importantly, though, the statute also reaches any place located within a 300-foot radius of the cemetery<sup>125</sup> or a 150-foot radius of any roadways or paths leading to the cemetery, including public roads and sidewalks.<sup>126</sup> While forum jurisprudence in lower courts indicates that cemeteries are nonpublic fora, the Supreme Court has yet to

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119. See *supra* note 62 and accompanying text (explaining that, because under the First Amendment the government cannot distinguish between favored and disfavored speech, speech regulations based on the content of expression are presumptively invalid).

120. See 38 U.S.C.A. § 2413(a)(1) (West 2006) (“[U]nless the demonstration has been approved by the cemetery superintendent or the director of the property on which the cemetery is located . . .”).

121. See *supra* notes 91-100 and accompanying text (explaining that there exists a heavy presumption of unconstitutionality for statutes providing for standardless prior restraint and outlining the different tests for determining whether the presumption is supported).

122. See Nauman, *supra* note 16, at 774 (noting that, because the standard of scrutiny to be applied depends on the type of forum, forum must be considered first).

123. 38 U.S.C.A. § 2413(a)(1) (West 2006).

124. 38 U.S.C.A. § 2413(a)(2)(B).

125. 38 U.S.C.A. § 2413(a)(2)(A)(i).

126. 38 U.S.C.A. § 2413(a)(2)(B).

address the question.<sup>127</sup> The Court likely would find that the cemetery property is a designated public forum, while the other areas fall within the first *Perry* category, the traditional public forum, since they have customarily been places of public discussion and expression.<sup>128</sup> Since both areas are within the public forum, speech regulations applied there will be subject to the same level of scrutiny.<sup>129</sup>

First, the cemetery property, including the roads and paths thereon, should be deemed a designated public forum.<sup>130</sup> As defined in *Perry*, a designated public forum is property that the state owns and has opened for expressive activity by the public.<sup>131</sup> Cemeteries, long used in the United States and throughout the world for people to gather and express their sentiments, fit within this definition.<sup>132</sup>

127. See *supra* notes 34, 36-41 and accompanying text (explaining the reasoning of two courts, one district and one circuit, in holding that municipal cemeteries are nonpublic fora).

128. See *Boos v. Barry*, 485 U.S. 312, 319 (1988) (finding that public streets and sidewalks are traditional public fora because they have been used immemorially for assembly of and communication among citizens).

129. See Nauman, *supra* note 16, at 775 (concluding that the same constitutional protections apply in a designated public forum opened by the government for public expression as in a traditional public forum); see also *supra* note 28 and accompanying text (explaining that in public fora, content-based restrictions are subject to strict scrutiny, while content-neutral restrictions are subject to intermediate scrutiny).

130. There is even an argument, albeit a weak one, that cemetery property could be deemed a traditional public forum. For more on this, see Edward J. Neveril, "Objective" Approaches to the Public Forum Doctrine: The First Amendment at the Mercy of Architectural Chicanery, 90 Nw. U. L. REV. 1185, 1238-39 (1996) (examining Justice Kennedy's suggestion in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring in the judgment) to define objective physical characteristics demonstrative of a traditional public forum). Justice Kennedy based his approach on "whether the property shares physical similarities with more traditional public forums." *Id.* at 1239 (quoting *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 698-99). Neveril's comment argues that

[T]he Arlington National Cemetery would appear to have many of the same physical qualities as the typical public park. It is wide-open, largely covered with greenery, and transected by a maze of sidewalks. Objective use is similar as well . . . . Under Justice Kennedy's objective approach, a court would be hard-pressed to classify the Cemetery as anything other than a public forum. In addition to the physical similarities, it is difficult to see how expressive activity in general would be incompatible with the normal uses of the Cemetery—especially if, as a factual matter, it had been opened to expressive activity by veterans' groups.

*Id.* at 1240.

131. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); see also *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 678 (elaborating on the forum categories defined in *Perry*).

132. See, e.g., ENCYCLOPEDIA BRITANNICA ONLINE, PYRAMID (2006), <http://www.search.eb.com.proxy.wcl.american.edu:2048/eb/article-9062034> (last visited Mar. 11, 2007) (describing the use of pyramids throughout the world, but most notably in Egypt and Central and South America, as royal tombs, especially between 2686 and 2345 B.C.); ENCYCLOPEDIA BRITANNICA ONLINE, SPAIN (2006), <http://www.search.eb.com.proxy.wcl.american.edu:2048/eb/article-70345> (last

Specifically, those cemeteries held by the National Cemetery Administration ("NCA") and Arlington National Cemetery have conferred this right on visitors since the 1860s, when the federal government commissioned their development.<sup>133</sup>

Admittedly, the Court has held that, although the government has opened its property to the public for such use, it is not required to do so indefinitely.<sup>134</sup> Yet, so long as the property remains open to the public, it takes on the same qualities as a traditional public forum.<sup>135</sup> Here, the federal government continues to keep all cemeteries subject to the Act open to the public. With an average of twenty-eight funerals per day,<sup>136</sup> Arlington National Cemetery welcomes around four million visitors every year.<sup>137</sup> Furthermore, the cemetery's Visitor Center offers maps and guidebooks, displays exhibits, provides information services including grave locations, and contains a bookstore, all designed to entice people to visit and accommodate them upon arrival.<sup>138</sup> While this is not typical of all federal cemeteries, the Department of Veterans Affairs' 123 National

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visited Mar. 11, 2007) (discussing the prominence of tombs, funerary monuments and cemeteries in Spain between 4500 and 3200 B.C.). See generally ENCYCLOPEDIA BRITANNICA ONLINE, CEMETERY (2006), <http://www.search.eb.com.proxy.wcl.american.edu:2048/eb/article-9022046> (last visited Mar. 11, 2007) (reviewing a general history of cemeteries world-wide and the impact of different religious, geographic, and cultural factors on their development).

133. See DEP'T OF VETERANS AFFAIRS, COMMC'NS AND OUTREACH SUPPORT DIV., *The National Cemetery Administration*, available at <http://www.cem.va.gov/ce/pdf/nca.pdf> (last visited Apr. 14, 2007) (highlighting that, in 1862, Congress enacted legislation authorizing the president to establish national cemeteries for fallen soldiers, who created the first fourteen that year); Arlington National Cemetery Visitor Information, Arlington National Cemetery Facts, [http://www.arlingtoncemetery.org/visitor\\_information/anc\\_facts.html](http://www.arlingtoncemetery.org/visitor_information/anc_facts.html) (last visited Feb. 27, 2007) (explaining that in 1864, the Secretary of War designated Arlington Mansion and two hundred acres around it for the burial grounds of veterans).

134. See *Perry Educ. Ass'n*, 460 U.S. at 46 (noting that a state may close its facility to the public).

135. See *id.* (explaining that so long as a state retains an open facility, content-based restrictions on speech are subject to strict scrutiny while content-neutral time, place, and manner regulations are permitted); see also *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (noting that "[o]nce a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say").

136. See Arlington National Cemetery Facts, *supra* note 133 (estimating that the cemetery conducts about 6400 funerals per year, with interments and inurnments averaging about twenty-eight per day).

137. See Arlington National Cemetery, Visitor Information, [http://www.arlingtoncemetery.org/visitor\\_information/index.htm](http://www.arlingtoncemetery.org/visitor_information/index.htm) (last visited Feb. 27, 2007) (explaining that the four million visitors each year include tourists as well as those attending funerals or paying respect to gravesites).

138. *Id.*

Cemeteries nevertheless received over 8.8 million visitors and interred more than 93,000 people in one recent year.<sup>139</sup>

Arlington National Cemetery and the cemeteries of the NCA can hardly be deemed nonpublic fora. The Court has previously found locations such as jails, military bases, and school mail systems to be nonpublic fora because communication is not open to the public in these places, even though they are owned by the State.<sup>140</sup> Specifically, in *Adderley v. Florida*,<sup>141</sup> the Court distinguished a state capitol building from a county jail, finding that while the former's grounds are open to the public, the latter's grounds are not.<sup>142</sup> Cemeteries, on the other hand, more closely resemble capitol grounds, where all citizens are permitted so long as they act peacefully.<sup>143</sup>

Furthermore, the Court has repeatedly held that, just as any property owner may maintain his or her property's purpose, the government may likewise preserve the "lawfully dedicated" use of its property.<sup>144</sup> For example, in *Adderley*, the Court reasoned that jailhouses close their grounds to serve the purpose of the facility's existence—to provide security.<sup>145</sup> A cemetery's purpose is admittedly to bury the dead and provide a place for others to remember them.<sup>146</sup> However, the NCA and Arlington National cemeteries also serve as tourist attractions and welcoming centers for millions of visitors each year.<sup>147</sup> Additionally, the Arlington National Cemetery

139. DEP'T OF VETERANS AFFAIRS, COMMUNIS AND OUTREACH SUPPORT DIV., *Facts About the National Cemetery Administration*, available at <http://www.cem.va.gov/cem/pdf/facts.pdf> (last visited Feb. 27, 2007) (reporting that 8.8 million people visited the 123 national cemeteries in fiscal year 2005).

140. See *supra* notes 30-32 (explaining the reasoning behind the Court's holding that these different places are nonpublic fora).

141. 385 U.S. 39 (1966).

142. See *id.* at 42-43 (distinguishing that case from *Edwards v. South Carolina*, 372 U.S. 229 (1963)).

143. See *Adderley*, 385 U.S. at 42-43.

144. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (assessing a school mail system's purpose); *Greer v. Spock*, 424 U.S. 828, 838 (1976) (assessing a military base's purpose); *Adderley*, 385 U.S. at 47 (assessing a county jail's purpose).

145. See *Adderley*, 385 U.S. at 47 (explaining that state capitol grounds are traditionally open to the public so long as the visitors are peaceful, whereas jailhouse grounds have no such tradition).

146. Memorandum from Dr. Tony Walter, Lecturer and Reader, University of Reading, to the Select Committee on Environment, Transport and Regional Affairs, House of Commons, United Kingdom Parliament (Dec. 2000), <http://www.publications.parliament.uk/pa/cm200001/cmselect/cmenvtra/91/91m48.htm>.

147. See *supra* notes 135-139 and accompanying text (explaining that until the government closes a designated public forum, it is treated as a traditional public forum, and the number of visitors to the cemeteries here demonstrates that the government has not yet closed this forum).

Superintendent notably testified that demonstrations are part of the cemetery's history, dating at least as far back as the Vietnam War.<sup>148</sup>

The lower courts that categorized cemeteries as nonpublic fora failed to address the above issues, and instead brushed over the forum analysis, claiming that cemeteries are "clearly" and "obviously" nonpublic.<sup>149</sup> Yet, as demonstrated above, a more in-depth discussion of forum jurisprudence reveals that municipal cemeteries fall largely within the definition of a designated public forum. As such, content-based restrictions on speech in cemeteries would be subject to strict scrutiny while content-neutral restrictions would be subject to intermediate scrutiny.<sup>150</sup>

Second, the areas outside of the cemetery property, including roads and sidewalks, should be deemed traditional public fora. A traditional public forum is an area that has "immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."<sup>151</sup> Public streets, sidewalks, and parks are the quintessence of traditional public fora.<sup>152</sup> Within 300 feet of the cemetery property and within 150 feet of any road or path leading to the cemetery property, there are countless public streets and sidewalks. Depending on how one defines "road, pathway, or other route of ingress to or egress from such cemetery property," the area subject to the statute likely encompasses parks as well.<sup>153</sup> Under established forum jurisprudence, then, the Court

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148. See generally *The Respect for America's Fallen Heroes Act: Hearing on H.R. 23, H.R. 601, H.R. 2188, H.R. 2963, H.R. 5037, and H.R. 5038 Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs*, 109th Cong. (2d Sess. 2006) [hereinafter *Hearings*], at 98 (statement of John Charles Metzler, Jr., Superintendent, Arlington National Cemetery).

149. *Supra* notes 35-41 and accompanying text.

150. See Nauman, *supra* note 16, at 775 (noting that content-based restrictions in both traditional and/or designated public fora face strict scrutiny analysis, while content-neutral restrictions face intermediate scrutiny).

151. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

152. See *Boos v. Barry*, 485 U.S. 312, 319 (1988) (finding that public streets and sidewalks are traditional public fora because they have been immemorially used for citizens to assemble, communicate, and engage in public debate).

153. 38 U.S.C.A. § 2413(a)(2)(A)(i) (West 2006); 38 U.S.C.A. § 2413(a)(2)(B). With a number of public roads leading onto cemetery property, it is difficult to say where a court would draw the line. For example, a major roadway has an exit providing direct ingress to and egress from Arlington National Cemetery property and that roadway continues for miles in either direction. In applying the statute, one wonders where the 150-foot radius surrounding the road ends. Does the bubble continue until the roadway's end? This ambiguity would probably be examined in a vagueness analysis under a procedural due process challenge. See *supra* note 12 (explaining the analysis in a facial challenge of a statute for vagueness). However, this Comment touches on this issue in its discussion of whether the Act is narrowly tailored. See *infra* notes 272, 274 and accompanying text (comparing this statute with



undoubtedly would deem the areas around the cemetery traditional public fora. The statute as applied to both areas is therefore subject to the same level of scrutiny since both the cemetery property, a designated public forum, and the surrounding areas, traditional public fora, are within the “public” realm.<sup>154</sup>

*B. Assessing the Respect for America’s Fallen Heroes Act’s Content Neutrality*

After addressing the question of forum, the Court next asks whether the regulation is based on the content of the speaker’s message.<sup>155</sup> Part II.B.1 maintains that the Act here should be deemed content based and subject to strict scrutiny because its enactment was biased, its language is viewpoint specific, and its enforcement is discriminatory. Part II.B.2 argues that if nevertheless found to be a content-neutral time, place, or manner restriction on speech, the Act still could not survive intermediate scrutiny since it is not narrowly tailored.

*1. The Respect for America’s Fallen Heroes Act is a content-based regulation of constitutionally protected speech and cannot survive strict scrutiny*

RAFHA is content based because its text distinguishes between speech based on viewpoint, it was enacted for biased reasons, and it is unfairly enforced.<sup>156</sup> While the government may regulate certain categories of speech that are unprotected by the First Amendment

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those of other cases and arguing that, as in those cases, RAFHA restricts more speech than necessary and is therefore not narrowly tailored).

154. See Nauman, *supra* note 16, at 775 (explaining that in both types of public fora, traditional and designated, intermediate scrutiny is applied to content-neutral restrictions and strict scrutiny is applied to content-based restrictions).

155. See *id.* at 770-76 (noting that the Court’s traditional approach to restrictions of First Amendment rights considers the forum first, then determines which standard of scrutiny to apply based on whether the law is content based or content neutral).

156. But see *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 985-86 (E.D. Ky. 2006) (order granting preliminary injunction) (concluding that a Kentucky law quite similar to RAFHA was content neutral, although it was motivated by both content-based and content-neutral factors). In *McQueary*, the court found the law content neutral after it considered the legislature’s intent, government interests, and the law’s text, but did not consider the law’s enforcement. See *id.* at 983-86 (finding the law content based to the extent that it was aimed at (a) prohibiting Westboro Baptist Church members specifically from protesting and (b) avoiding violent interaction between mourners and protesters, but ultimately concluding that the law was content neutral because of its other predominate purposes: (a) to prevent all interference with funerals, regardless of its source or content, and (b) to protect citizens from unwanted communications). While looking at the legislature’s motivation as well as the law’s text are important factors in determining content neutrality, consideration of the regulation’s enforcement is equally important. See *infra* notes 159-160 and accompanying text (maintaining that where these three factors are biased, courts will find the speech restriction content based). Since the district court ignored this factor, its finding that the Kentucky law was content neutral should have no impact on the analysis here.

based on content, RAFHA regulates protected speech.<sup>157</sup> Therefore, because content-based regulations of protected speech are subject to strict scrutiny, the Court should test the Act under the strict scrutiny standard. The Act, however, cannot meet this exacting standard because it is not narrowly tailored to serve a compelling governmental interest and could not even survive an analysis under the less-demanding intermediate scrutiny standard.<sup>158</sup>

First, to determine whether the Act is content based, one must consider certain factors, including the restriction's text, enactment, and enforcement.<sup>159</sup> If the Court finds these factors to be biased, it likely will deem the regulation viewpoint-specific.<sup>160</sup> Generally, where a law's language expressly distinguishes between speech based on the views or ideas expressed, the Court finds that law to be content based.<sup>161</sup> For example, in *Hill*, the Court found that a law restricting speech in front of medical clinics was not content based in part because its text made no reference to the content of the speech, but rather applied equally to all demonstrators.<sup>162</sup>

RAFHA, on the other hand, does not apply equally to all demonstrators. Instead, the text of the Act explicitly favors one category of speech over another, namely speech that is "part of a funeral, memorial service, or ceremony."<sup>163</sup> As such, RAFHA would not by its terms prohibit the Patriot Guard Riders from making noise, orating, or displaying banners or flags because their "demonstration" is considered part of the service.<sup>164</sup> The Riders are a group of

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157. See *supra* notes 63-66 and accompanying text (describing different types of unprotected speech).

158. See *supra* notes 67-89 and accompanying text (summarizing the strict and intermediate scrutiny standards and the difficulties in proving the higher standard's requirements); *infra* Part II.B.2 (arguing that the Act does not meet the intermediate scrutiny standard because it is not narrowly tailored to serve a significant state interest and does not leave open ample alternative channels of communication).

159. See *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (analyzing an ordinance's content neutrality by looking at its text, enactment, and enforcement).

160. Cf. *id.* (finding that the ordinance in that case was viewpoint neutral since its text, enactment, and enforcement did not favor one category of speech over another).

161. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994) ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.").

162. See *Hill v. Colorado*, 530 U.S. 703, 719 (2000) (determining that the law was content neutral because it was a regulation of place, not speech; it was not adopted because of disagreement with the speaker's message and applied equally to all demonstrators; and the governmental interest was unrelated to the content of the speech).

163. 38 U.S.C.A. § 2413(b)(2)-(3) (West 2006).

164. See Patriot Guard Riders, Mission Statement, <http://patriotguard.org/>

motorcyclists whose mission is to “[s]hield the mourning family and their friends from interruptions created by any protestor or group of protestors.”<sup>165</sup> This group formed in response to the Westboro Baptist Church’s (“WBC”) actions and now demonstrates against WBC’s presence by escorting funeral guests to the funeral site or memorial service.<sup>166</sup> The Riders’ presence at military funerals is as politically driven and demonstrative as that of their counterparts.<sup>167</sup> The Riders arrive on loud motorcycles decorated with American flags, wear Patriot Guard Rider paraphernalia, and hold flags during the service to block picketers from the view of funeral guests.<sup>168</sup>

Nevertheless, the motorcyclists would be permitted under the Act to demonstrate in their way, waving flags and wearing Patriot Guard Rider patches, since their expression is patriotic and thus considered “part of the funeral.”<sup>169</sup> WBC picketers, on the other hand, would not be permitted to wave their signs or wear upside-down American flags in protest because this conduct would be deemed disrespectful and, therefore, not part of the funeral. The Patriot Guard Riders are merely counter-protesting in response to WBC’s demonstrations and should be subject to this law if it is to be content neutral.<sup>170</sup> Instead, the law’s text distinguishes between these two types of speech based on the ideas and views expressed, which is clearly content based under *Hill*.<sup>171</sup>

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Home/tabid/53/Default.aspx (last visited Feb. 27, 2007) (noting that they attend funerals as guests of the deceased soldier’s family).

165. *Id.*

166. See Press Release, U.S. Senator Evan Bayh, Bayh Joins Bipartisan Coalition Honoring Patriot Guard Riders (July 18, 2006), <http://bayh.senate.gov/~bayh/releases/2006/0718JULY06PR.htm> (explaining that the group started in Kansas in response to the Westboro Baptist Church protests and describing the Riders’ technique for countering the Church’s protests).

167. See Patriot Guard Riders, Our History, <http://patriotguard.org/AboutUs/OurHistory/tabid/145/Default.aspx> (last visited Feb. 27, 2007) (stating that the group formed in August 2005 because it was “appalled to hear that a fallen hero’s memory was being tarnished by misguided religious zealots,” and that it immediately began “form[ing] a battle plan to combat Fred Phelps and the Westboro Baptist Church”).

168. See Patriot Guard Riders, PGR FAQ, <http://patriotguard.org/PGRFAQ/tabid/250/Default.aspx> (last visited Feb. 27, 2007) (stipulating that, while there is no official dress code, members are encouraged to purchase and wear Patriot Guard Riders patches); Press Release, U.S. Senator Evan Bayh, *supra* note 166 (describing a funeral where Riders stood with their backs to protesters and used American flags to block funeral-goers from seeing them).

169. See *supra* note 164 and accompanying text (stating that, as guests of the family, the Riders are permitted to demonstrate under the statute).

170. See *supra* notes 44-48 and accompanying text (explaining that laws that discriminate between viewpoints, whether discretely through application or explicitly in the statutory language, are most often content based).

171. See *supra* note 162 and accompanying text (explaining the *Hill* Court’s reasoning for finding the law in controversy not to be content based).

Of course, the Court has held that even if a statute affects only certain speakers, it may nonetheless be deemed content neutral if it serves a purpose unrelated to the content of the expression.<sup>172</sup> To make this determination, a content-neutrality analysis scrutinizes the statute's enactment, asking whether the government passed the regulation because it disagreed with the message of the restricted expression.<sup>173</sup> Here, hearing testimony and floor statements from members of Congress demonstrate that Congress enacted RAFHA because it strongly disagreed with the WBC's message.<sup>174</sup> In fact, one U.S. Representative went so far as to admit that "while we may disagree with the message, we don't disagree that they have a right to deliver it. It is just not appropriate."<sup>175</sup>

While the Act's sponsors tried to use language that the Supreme Court already approved as constitutional,<sup>176</sup> they nonetheless made clear that their objective was to silence those who protest the funerals of "military heroes."<sup>177</sup> The Act's language prohibiting

172. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (explaining that incidental effects on some messages or speakers but not others do not render a regulation content based so long as the governmental purpose is unrelated to the expression's content) (citations omitted).

173. See *id.* (finding that a government regulation is content neutral where, by looking at the government's purpose, it is justified without reference to the regulated speech's content); Nauman, *supra* note 16, at 796 (explaining the *Rock Against Racism* test, in which the primary inquiry in determining the restriction's content neutrality is whether the government's principal motivation for adopting a law is based on a disagreement with the message conveyed). But see *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) (stating the "familiar principle of constitutional law that [the Supreme] Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive" because "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it").

174. See, e.g., *Hearings*, *supra* note 148, at 46-47 (statement of Rep. Steve Chabot, Chairman, Subcomm. on the Constitution) (stating that he was promoting RAFHA before the Committee because of the recent trend of military funeral protests, which he finds incompatible with the respect owed to service members); 152 CONG. REC. H2204 (daily ed. May 9, 2006) (statement of Rep. Silvestre Reyes) (stating that he disagreed with the message and that, although he believed they had a right to express it, doing so at military funerals was inappropriate); *infra* note 181 and accompanying text (quoting two congressmen's understandings of RAFHA's purpose).

175. 152 CONG. REC. H2204 (daily ed. May 9, 2006) (statement of Rep. Silvestre Reyes).

176. See *Hearings*, *supra* note 148, at 44 (2006) (statement of Rep. Mike Rogers, Member, Comm. on Energy and Commerce) (claiming that the Act uses, "word for word," language already approved by the Court so as to "eliminate any doubt concerning the [c]onstitutionality of H.R. 5037"); 152 CONG. REC. H2202 (daily ed. May 9, 2006) (statement of Rep. Steve Chabot) (explaining that the Act's demonstration provision mirrors the language of the restriction upheld in *Grayned v. City of Rockford*, 408 U.S. 104 (1972)).

177. See 152 CONG. REC. H2202 (daily ed. May 9, 2006) (statement of Rep. Steve Chabot) (describing the picketers' tactics and saying that they "should not be consistent with our Nation's laws"); 152 CONG. REC. S5129 (daily ed. May 24, 2006)

demonstrations, which includes making any “noise or diversion that disturbs or tends to disturb the peace or good order of the funeral,”<sup>178</sup> mirrors that of an anti-noise ordinance upheld in *Grayned v. City of Rockford*.<sup>179</sup> The members of Congress supporting the Act argue that it is justified without reference to the regulated speech’s content because it was intended to keep the peace and respect the privacy of mourning family and friends.<sup>180</sup> However, the sponsoring Congress members’ speeches regarding this statute make clear that its purpose—to prevent protesters who “feel a military funeral is an appropriate forum to display their beliefs on gay rights”—is one directly related to the content of the expression.<sup>181</sup> Since the government enacted RAFHA because it disagreed with the message of the restricted expression, the Court should deem RAFHA content based.

The Act’s enforcement is also biased. As described above, it has not been and is not likely to be enforced against the Patriot Guard Riders.<sup>182</sup> In fact, it is also quite unlikely that it will be enforced against tourists or other cemetery visitors who display American flags on their cars or clothing. Nevertheless, those visitors are probably in violation of the law if they have an American flag pin attached to their lapel on cemetery property or within a 300-foot radius of the cemetery property line during the applicable times. Such biased enforcement is yet another factor demonstrating that this law is not content neutral, but rather viewpoint specific.

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(statement of Sen. Larry Craig) (explaining that the Act was “conceived in response to hateful, intolerant demonstrations taking place at the funeral services of deceased servicemembers”).

178. 38 U.S.C.A. § 2413(a)(2)(A)(ii) (West 2006).

179. Cf. *Grayned*, 408 U.S. at 107-08 (upholding an ordinance that read: “[N]o person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof . . .”).

180. See 152 CONG. REC. H2200-01 (daily ed. May 9, 2006) (statement of Rep. Silvestre Reyes) (explaining that the protests disrupt the sanctity of the funerals and the privacy of the families in mourning). These governmental interests, which have little merit, are examined below. See *infra* notes 221-252 and accompanying text (assessing RAFHA’s governmental interests in the sanctity of cemeteries and the families’ privacy and dignity, and concluding that these interests fail to satisfy intermediate scrutiny).

181. 152 CONG. REC. E774 (Extensions of Remarks May 10, 2006) (statement of Rep. Dennis Moore); see also 152 CONG. REC. H2200 (daily ed. May 9, 2006) (statement of Rep. Steve Buyer) (noting that after he recounted some of the WBC’s tactics, “most all [of] my colleagues shared a deep abhorrence to these outrageous acts and . . . share[d] equally a deep desire to prevent them”).

182. See *supra* notes 164-168 and accompanying text (discussing the Patriot Guard Riders’ tactics in counter-demonstrating against the WBC, including wearing Rider insignia).

When the Supreme Court finds that a statute is indeed content based, it then determines whether the Act regulates protected or unprotected expression under the First Amendment.<sup>183</sup> Political speech, as restricted here, is among the quintessential forms of protected speech.<sup>184</sup> With regard to printed or symbolic expression, the Supreme Court has held that peaceful picketing and leafletting constitute protected “speech” for purposes of a First Amendment analysis.<sup>185</sup> Nevertheless, where the speech’s content is extremely provocative and plays “no essential part of any exposition of ideas,” it is possible that it no longer falls under the First Amendment’s protection.<sup>186</sup>

Here, the Act’s supporters harp on the family’s vulnerable state, the dignity of fallen soldiers, and the WBC protesters’ offensive language in defending the restrictions.<sup>187</sup> However, the Court has held that neither the “sensitive person standard” nor the “dignity standard” is the appropriate gauge for determining what speech must be censored.<sup>188</sup> Instead, the Court relies on “community standards,” whereby the Court judges a message based on its impact on an average person, not a particularly susceptible or sensitive one.<sup>189</sup> In

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183. See *supra* notes 63-66 and accompanying text (describing different types and the alternative analysis of “expression” unprotected under the First Amendment).

184. See *Boos v. Barry*, 485 U.S. 312, 318 (1988) (recognizing that the Court has long held that the First Amendment protects debate on public issues (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Connick v. Myers*, 461 U.S. 138, 145 (1983); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982))).

185. *United States v. Grace*, 461 U.S. 171, 176 (1983) (“There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving ‘speech’ protected by the First Amendment.”) (citations omitted).

186. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); see also *id.* at 574 (defining fighting words as those “epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace”).

187. See 152 CONG. REC. H2200 (daily ed. May 9, 2006) (statement of Rep. Steve Buyer) (claiming that the Constitution should not be manipulated to justify the harassment of grieving families by protesters with offensive signs); 152 CONG. REC. H2202 (daily ed. May 9, 2006) (statement of Rep. Joe Baca) (stating that protesters are harassing mourning families with hurtful signs and speech, which causes undue stress for the families and lessens the pride and dignity in burying fallen soldiers).

188. See *Ashcroft v. ACLU*, 535 U.S. 564, 574-75 (2002) (“[T]his Court held that this sensitive person standard was ‘unconstitutionally restrictive of the freedoms of speech and press’ and approved a standard requiring that material be judged from the perspective of ‘the average person, applying contemporary community standards.’” (quoting *Roth v. United States*, 354 U.S. 476, 489 (1957))); *Boos*, 485 U.S. at 322 (rejecting the assertion that “protecting the dignity of foreign diplomatic personnel” by shielding them from insults qualifies as a compelling governmental interest because such a dignity standard is too subjective and would punish speech with an emotional impact on the audience, contrary to free speech jurisprudence); see also *Hamling v. United States*, 418 U.S. 87, 107 (1974) (emphasizing that the principal purpose of the community standards criterion “is to assure that the material is judged neither on the basis of each juror’s personal opinion, nor by its effect on a particularly sensitive or insensitive person or group”).

189. *ACLU*, 535 U.S. at 575 (citation omitted).

fact, even where the United States was bound by international treaty to prevent impairment to the dignity of foreign diplomats, the Court rejected the “dignity standard” and held that, under the First Amendment, people must tolerate both insulting and outrageous speech in public debate.<sup>190</sup> Therefore, any argument that insulting expression should be curbed because funeral-goers are in an emotionally vulnerable state is legally invalid, despite being morally proper.

Alternatively, the Act’s supporters might argue that the WBC’s speech is unprotected because it is offensive or constitutes fighting words.<sup>191</sup> Yet, the protesters’ speech falls within neither of these definitions. To begin, a restriction may curtail offensive speech only when the expression is so intrusive that an unwilling audience is captive and cannot avoid it.<sup>192</sup> An audience is captive when it cannot help but listen to or see a certain message.<sup>193</sup> Persons in their home exemplify a captive audience,<sup>194</sup> but the Court has also recognized an unwilling listener’s “right” to avoid unwanted communication in confrontational public settings.<sup>195</sup> Although the Supreme Court held in earlier cases that it is up to the listener to avoid unwanted speech outside of the home,<sup>196</sup> it later moved away from this approach.<sup>197</sup> For

190. See *Boos*, 485 U.S. at 322 (explaining that First Amendment speech rights need breathing space in order to survive and refusing to punish speech that adversely impacts listeners (quoting *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988))).

191. See *Collins & Hudson, Jr.*, *supra* note 108, at 66 (suggesting that supporters might rely on the offensive speech and fighting words doctrines to defend speech restrictions, but ultimately finding that they would not be applicable to recent funeral protests).

192. See *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (finding that the First Amendment permits prohibition of offensive speech where the audience is captive by deeming such speech “intrusive”); see also *Hill v. Colorado*, 530 U.S. 703, 716 (2000) (explaining that, in the context of the unwilling listener, the First Amendment does not require captive audiences to “undertake Herculean efforts” to avoid unwanted communication (citing *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 772-73 (1994))).

193. See *Nauman*, *supra* note 16, at 776-80 (defining a captive audience according to earlier cases, but suggesting that *Hill* may have expanded the doctrine’s scope).

194. See *Hill*, 530 U.S. at 717 (acknowledging that while “the right to avoid unwelcome speech” is particularly strong in and around one’s home, it can also be protected in public confrontational settings (citing *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 738 (1970), and *Frisby*, 487 U.S. at 485)).

195. See *id.* at 717 n.24 (explaining that “[t]his common-law ‘right’ is more accurately characterized as an ‘interest’ that States can choose to protect in certain situations” (citing *Katz v. United States*, 389 U.S. 347, 350-51 (1967))).

196. See *Nauman*, *supra* note 16, at 777 (explaining that *Cohen v. California*, 403 U.S. 15 (1971), stood for this principle, which makes it quite difficult for an audience to be deemed “captive” in public places); Marcy Strauss, *Redefining the Captive Audience*, 19 HASTINGS CONST. L.Q. 85, 96 (1991) (claiming that Supreme Court decisions like *Cohen*, 403 U.S. at 15, and *Erznoznik v. City of Jacksonville*, 422 U.S.

instance, in abortion clinic cases, the Court has analogized patients in clinics to residents in private homes, finding that certain speech was not permitted outside of the clinic because targeted picketing of a clinic, like that of a home, threatened the patients' well-being.<sup>198</sup> Patients approaching the clinic but not yet inside, however, were *not* considered captive and, as a general matter, had to tolerate picketers' peaceful speech on the sidewalks.<sup>199</sup>

Here, picketing a cemetery is like picketing a clinic in that the targeted audience is probably in a vulnerable emotional state and must use the sidewalks to reach their final destination. There are, nevertheless, several important differences between the two. First, medical circumstances held clinic patients captive since they could not leave the facility or their health might be endangered.<sup>200</sup> Cemetery visitors, on the other hand, are not bound to the cemetery property by any condition, such as treatment at a clinic, but choose to attend the services at a public location.<sup>201</sup> That brings up a second point: the memorial services are indeed held in a public location. Granted, in *Lehman v. City of Shaker Heights*,<sup>202</sup> a plurality decision, the Supreme Court upheld an ordinance prohibiting political advertisements in city buses, which are undoubtedly public, because the captive audience would be forced to withstand political

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205 (1975), emphasize that the responsibility of avoiding offensive speech falls on the listener).

197. See, e.g., *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974) (holding that city transit system patrons were captive even though they could turn away from offensive speech).

198. See William E. Lee, *The Unwilling Listener: Hill v. Colorado's Chilling Effect on Unorthodox Speech*, 35 U.C. DAVIS L. REV. 387, 406 (2001) (citing *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994)) (explaining that the *Madsen* Court found the state's interests in protecting a captive audience, ensuring public safety, and preventing traffic problems sufficient to justify the injunction).

199. See Lee *supra* note 198, at 406-08 (discussing *Madsen*, which upheld a restriction on noise levels but struck down the restriction on "images observable" based on the difference in effort that patients must make to avoid unwanted communication).

200. See *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 372 (1997) (listing the reasons, including protecting the medical privacy of "captive" patients, for finding constitutional the injunction in *Madsen*, which prohibited displaying images or making noise that could be seen or heard in the clinic as well as approaching any person within a 300-foot radius of the clinic unless the person acquiesced).

201. But see *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 992 (E.D. Ky. 2006) (order granting preliminary injunction) (assuming that funeral attendees, like clinic patients, are captive because they have no choice in the funeral service's location and must go to the designated place if they wish to take part in the event).

202. 418 U.S. 298 (1974).



propaganda.<sup>203</sup> The bus riders were deemed captive because they were taking public transit “as a matter of necessity, not of choice.”<sup>204</sup> Here, the families could choose to hold memorial services in their homes or in private funeral homes, and to bury their loved ones in private cemeteries.<sup>205</sup>

Moreover, a majority of the Court held in *Lehman* that the degree of captivity largely depends on location, with a bus passenger suffering a significantly higher degree of captivity than a person on the street.<sup>206</sup> Mourners attending services in cemeteries pass demonstrators on the street, and are thus captive to a lesser degree, if at all.<sup>207</sup> For these reasons, the funeral-goers are hardly a captive audience and, because speech is offensive only when it intrudes upon an unwilling, captive audience,<sup>208</sup> the speech here cannot be found offensive.

Additionally, the fighting words doctrine is not applicable to the expression here because the protests lack the close proximity of physical contact, the direct provocation of violence, and an imminent and significant breach of the peace.<sup>209</sup> The doctrine removes from the First Amendment’s protection those words “likely to provoke the average person to retaliation, and thereby cause a breach of the peace.”<sup>210</sup> Here, while the WBC’s speech may offend the great

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203. See *id.* at 303 (finding that the city has discretion in making reasonable decisions on who may advertise in what the Court termed “part of the [transit system’s] commercial venture”).

204. *Id.* at 302 (citation omitted).

205. See *infra* notes 251-252 and accompanying text (discussing these options with regard to preserving the family’s privacy interests).

206. See Christopher Dengler, Cell Phones and the First Amendment in Flight: Can the FCC and FAA Maintain the Ban? 35-36 (Mar. 8, 2006) (unpublished J.D. student symposium article, Loyola of Los Angeles Law Review), available at <http://llr.lls.edu/symposium/Dengler%20-%20final.doc> (explaining that both the plurality and concurring opinions agreed that the degree of captivity and intrusion of privacy varied according to location of the audience).

207. See *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 992 (E.D. Ky. 2006) (order granting preliminary injunction) (holding that funeral attendees, despite finding them to be captive, could easily avoid observing unwanted written expression by averting their eyes upon passing protesters).

208. See *supra* notes 194-195 and accompanying text.

209. See *Collins & Hudson, Jr.*, *supra* note 108, at 66 (finding that even if all three of these elements were present, the Act would be pointless since laws forbidding a breach of the peace are already in place and would handle such situations). It is relevant to note that the fighting words doctrine has hardly, if ever, been used to uphold a conviction since its introduction in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). See *Collins & Hudson, Jr.*, *supra* note 108, at 66 (identifying the fighting words doctrine as “rarely used”); FreedomForum.org, What is the Fighting Words Doctrine?, <http://www.freedomforum.org/packages/first/fightingwords/index.htm> (last visited Mar. 1, 2007) (summarizing the doctrine’s usage and concluding that the Court has not used it to uphold a conviction since its creation).

210. *Chaplinsky*, 315 U.S. at 574.

majority of passersby, perhaps even causing others to become aggressive, this alone cannot be deemed an incitement to breach the peace. That is, even if the protesters need police protection due to the crowd's disagreement with their views, "constitutional rights may not be denied simply because of hostility to their assertion or exercise."<sup>211</sup>

As explained in Part I, the speech must also be directed at an individual or small group of people and play no essential part of any exposition of ideas.<sup>212</sup> While one may argue that the WBC's distasteful slogans target individuals attending the funerals,<sup>213</sup> one can hardly deem the expression to play no essential part of debate. Political dissent is one of the most valued types of expression in America and has been since before this country's inception.<sup>214</sup> WBC's demonstrations are designed to express disagreement with United States policies and constitute the quintessence of political speech.<sup>215</sup> As such, the speech does not fall under the fighting words doctrine.

Finally, assuming that the Court finds the Act to be a content-based regulation of protected speech, the Court would apply its strict scrutiny standard.<sup>216</sup> Often, the Court's application of strict scrutiny to regulations is "strict in theory, but fatal in fact."<sup>217</sup> Here, the Act cannot meet this standard's high requirements, as it cannot even satisfy the lower intermediate scrutiny standard.<sup>218</sup>

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211. *Cox v. Louisiana*, 379 U.S. 536, 551 (1965) (quoting *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963)).

212. See *supra* note 67 and accompanying text.

213. See *Anti-gay group protests at National Cemetery*, *supra* note 1 (stating that the picketers held a sign proclaiming "You're going to Hell").

214. See *Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957) (discussing the importance of the freedom of speech, particularly the freedom of minority political expression, in the foundation of America's democracy).

215. See *Collins & Hudson, Jr.*, *supra* note 108, at 66 (stating that WBC members protest because they disagree with the nation's tolerance of homosexuality).

216. For a content-based statute to survive strict scrutiny, it must be justified by a compelling governmental interest, narrowly tailored, and use the least restrictive means for achieving the state interest. See *supra* note 68 and accompanying text (articulating the requirements for a statute to survive strict scrutiny analysis).

217. See *Bartnicki v. Vopper*, 532 U.S. 514, 548 (2001) (Rehnquist, C.J., dissenting) (recognizing that the strict scrutiny standard is often fatal); Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 665 (2006) (finding that the strict scrutiny standard in the context of free speech is "'strict' in theory and fatal in fact") (citation omitted). But see *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) ("Strict scrutiny is not 'strict in theory, but fatal in fact.'" (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995))).

218. See *supra* notes 61-75 and accompanying text (describing the high requirements of strict scrutiny review and the difficulties in meeting the exacting standard).

2. *The Respect for America's Fallen Heroes Act, if found to be a content-neutral time, place, and manner restriction, cannot survive intermediate scrutiny*

As explained above, a statute survives intermediate scrutiny where it is narrowly tailored to serve a significant governmental interest and leaves open ample channels for communication of the message.<sup>219</sup> Here, the Act would not survive because the government interest is not significant, the law is not narrowly tailored,<sup>220</sup> and the restrictions do not leave open ample channels of expression.

The government intends RAFHA to serve two stated interests. First, it is designed to protect the character and sanctity of the military cemeteries, as demonstrated by its provision forbidding

219. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

220. While an argument may be made that RAFHA is overbroad, the Court likely would reject this argument by relying on *Hill v. Colorado*, 530 U.S. 703 (2000). Laws that are overbroad not only fail the narrowly tailored test, but are facially unconstitutional because they deter constitutionally protected activity. See *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (explaining that the Court developed the First Amendment doctrine of overbreadth out of concern that an overbroad law, especially one imposing criminal punishment, would discourage citizens from engaging in constitutionally protected speech because they feared litigation and/or punishment); see also *City of Houston v. Hill*, 482 U.S. 451, 463 n.11 (1987) (concluding that, although obstruction of police duties "might constitutionally be punished under a properly tailored statute," the statute criminalized constitutionally protected speech and was thus overbroad and invalid); *Grayned v. City of Rockford*, 408 U.S. 104, 114-15 (1972) (finding that an overbroad law deters constitutionally protected activity and therefore poses a significant threat to First Amendment rights). The Court has reasoned that, since the "social costs" of enforcing an overbroad law are significant, the doctrine appropriately mandates total invalidation of the speech regulation. *Hicks*, 539 U.S. at 119 (reasoning that overbreadth adjudication decreases "social costs" such as reduced expression and a repressed marketplace of ideas resulting from the withholding of protected speech). For a law to be deemed overbroad, it must have the effect of substantially restricting constitutionally protected conduct. See *id.* at 119-20 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)) (finding that an overbroad law's application to protected activity must be substantial, both absolutely and relative to the scope of the law's legitimate applications, so as to prevent permitting constitutionally unprotected conduct, which could result from overapplication of the overbreadth doctrine). In *Hill v. Colorado*, the Court distinguished between laws that by their terms restrict protected speech and those that restrict unprotected conduct, yet also encompass protected speech. 530 U.S. at 730-31 (explaining that the defendants misplaced their reliance on cases concerning regulations of unprotected activity that also implicated protected speech because here defendants challenged a regulation of protected speech). While the overbreadth doctrine applies to the latter, the former is simply a matter of plain free speech analysis. See *id.* (finding that the defendants misunderstood the overbreadth doctrine in attempting to apply it to a statute that bans protected speech by its terms, instead finding that, as a content-neutral speech regulation, the proper analysis was whether it was a reasonable time, place, and manner regulation of protected conduct). Here, the Act does not regulate unprotected speech as shown in Part II.B.1. Therefore, the Court likely would find an overbreadth analysis of this law inappropriate.

disturbances of the peace or service.<sup>221</sup> Second, the supporting members of Congress sought to protect the privacy of mourning family and friends of deceased service members.<sup>222</sup> While the first interest might constitute a significant governmental interest, the second does not.

The Court has not expressly recognized an interest in preserving the solemn character of military cemeteries, yet it likely would deem such an interest to be a significant governmental interest. In *Grayned v. City of Rockford*, the Court found that preventing disturbances to school activities constitutes a valid state interest because noisy demonstrations are incompatible with normal school activities.<sup>223</sup> Likewise, the Court held in *Ward v. Rock Against Racism* that the State had a significant interest in protecting citizens from unwanted noise.<sup>224</sup> Here, the government could argue that noisy demonstrations are incompatible with normal cemetery activities and that its interest in preserving the reverential character of military cemeteries is therefore valid.

Alternatively, the government might argue that the Act is, in protecting the nature of the cemeteries, intended to protect against breaches of the peace. Although the Court has consistently recognized an interest in preventing a breach of the peace, this is a weak argument here.<sup>225</sup> In *Cox v. Louisiana*<sup>226</sup> and *Edwards v. South Carolina*,<sup>227</sup> the Court invalidated statutes designed to protect against breaches of the peace because they were overly broad and punished

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221. See 152 CONG. REC. H2200 (daily ed. May 9, 2006) (statement of Rep. Steve Buyer) (stating that the Act will protect the sanctity of military funerals); 152 CONG. REC. H2206 (daily ed. May 9, 2006) (statement of David F. Forte, Professor of Law, Cleveland-Marshall College of Law, before the Subcomm. on Disability Assistance and Mem'l Affairs of the H. Comm. on Veterans' Affairs) (explaining that the text of the Act, which prohibits diversions causing disturbance of the peace or funeral, makes clear that its purpose is to guarantee the dignity of military funerals).

222. See 152 CONG. REC. H2200 (daily ed. May 9, 2006) (statement of Rep. Steve Buyer) (stating that the Act will protect grieving families' privacy); *Hearings, supra* note 148, at 44 (statement of Rep. Mike Rogers, Member, H. Comm. on Energy and Commerce) (stating that he introduced the legislation to "shelter grieving families from demonstrators trying to disrupt funeral services"); *id.* at 52 (statement of Rep. Silvestre Reyes) (arguing that the "bill is narrowly tailored to protect military families from . . . verbal attacks").

223. See 408 U.S. 104, 119 (1972) (upholding an anti-noise ordinance because it was narrowly tailored to serve the government's compelling interest).

224. See 491 U.S. 781, 796 (1989) (finding that this interest may be greatest when protecting unwanted noise penetrating the home, but in certain cases, it is also applicable in such traditional public fora as parks and streets).

225. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 407-10 (1989) (recognizing a government interest in preventing a breach of the peace, but finding that on the facts in that flag-burning case, the interest could not support the conviction).

226. 379 U.S. 536 (1965).

227. 372 U.S. 229 (1963).

peaceful, albeit loud and disfavored, expression.<sup>228</sup> The Court has repeatedly held that “[t]he mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.”<sup>229</sup> Here, the Court likely would find that the funeral picketers are not causing a breach of the peace since, although they sing and chant loudly, they are not using “fighting words,” but merely presenting ideas contrary to that of the majority.<sup>230</sup>

Conversely, the Court probably would reject the suggested interest in protecting the family’s privacy. The Court has found two relevant privacy interests adequately significant to pass intermediate scrutiny.<sup>231</sup> First, in *Hill v. Colorado*, the Court recognized the privacy interest in avoiding unwanted communication, a part of a citizen’s larger common law “right to be let alone,” on public sidewalks.<sup>232</sup> In the context of that case, this interest protected those entering a medical facility from “persistent importunity, following and dogging.”<sup>233</sup> Hesitant to define this interest too broadly, the Court conceded that the interest’s strength varies with location<sup>234</sup> and it must be balanced with the right of others to communicate.<sup>235</sup> In *Hill*,

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228. See *Cox*, 379 U.S. at 550-51 (reversing the convictions of protesters who had picketed, sang, orated, clapped, and stomped their feet in the state capitol building in part because their action was not inciting violence in any way); *Edwards*, 372 U.S. at 237-38 (finding the offense to be too generalized, and thus the conviction invalid, because all that was needed to prove a violation was that protesters presented views sufficiently disfavored by the public to necessitate police protection).

229. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 414 (1992) (White, J., concurring in the judgment).

230. See *Cox*, 379 U.S. at 551 (analogizing to *Edwards*, 372 U.S. 229, and distinguishing from *Feiner v. New York*, 340 U.S. 315 (1951), where a public speaker encouraged black listeners to rise up against whites and caused the crowd to become restless, because the protesters’ actions in *Cox* were significantly different).

231. See *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 167 (2004) (finding that families of deceased persons can assert a valid privacy interest in police images of the deceased against the media); *Hill v. Colorado*, 530 U.S. 703, 716-17 (2000) (describing the unwilling listener’s interest in being “let alone” as one of the most valued rights).

232. 530 U.S. at 716; see Nauman, *supra* note 16, at 770 (explaining that although the Court found such an interest existed, it did not clarify when or where it would apply in future cases). This interest appears to be the primary justification for the captive audience doctrine, discussed above in Part II.B.1. See Strauss, *supra* note 196, at 106-16 (explaining that courts typically use this right or the “right to privacy” to justify the captive audience doctrine and suggesting that these ambiguous rights could mean one of three things: the right to choose, the right to repose, or the right to be free from offensive speech).

233. *Hill*, 530 U.S. at 717-18 (internal quotations omitted) (quoting *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 204 (1921)).

234. See *id.* at 716 (explaining that such a privacy interest is less important when in a public park than in one’s private residence) (citing *Cohen v. California*, 403 U.S. 15, 21-22 (1971)).

235. See *id.* at 718 (explaining that even though preserving the freedom to communicate is a substantial concern, it must nonetheless be weighed against the

demonstrators sought to educate those entering the clinic and purposefully followed patients in order to have a discussion with them.<sup>236</sup>

The privacy interest in *Hill* is nevertheless distinguishable from the privacy interest advanced in support of RAFHA. Here, the interest is not as significant as it was in *Hill* because the protesters are not “following and dogging,” but picketing in one place on public streets and sidewalks.<sup>237</sup> Under *Hill*, people may approach others, even in an offensive manner, with the purpose of educating them or trying to convince them of another viewpoint until the person declines the offer.<sup>238</sup> At that point, the advocate must cease and desist.<sup>239</sup> WBC’s purpose is to persuade American citizens and politicians to change their lifestyles and this country’s public policies.<sup>240</sup> Yet, even if done aggressively or offensively, there is no privacy interest as described in *Hill* since the picketers are not approaching those attending funerals, but rather demonstrating in one place at cemetery entrances.<sup>241</sup> The physical proximity in such instances is thus nothing like that in *Hill*, where “sidewalk counselors” approached individuals entering the medical facility to speak with them one-on-one.<sup>242</sup> Without such physical proximity, the privacy interest as protected in *Hill* is simply not relevant here. Lastly, the final consideration from *Hill* weighs the

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right to be let alone) (citing *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 736 (1970)).

236. See Lee, *supra* note 198, at 389-94 (describing tactics used by “sidewalk counselors,” such as closely approaching patients and trying to establish a rapport with them, displaying graphic printed materials if patients “[do] not respond to ‘positive’ literature,” and praying for them).

237. See *Anti-gay group protests at National Cemetery*, *supra* note 1 (describing the WBC protesters’ location in a small, closed-off area across a four-lane highway from the protesters supporting the military families).

238. See *Hill*, 530 U.S. at 717-18 (finding that accosting a person in an offensive way to debate an issue does not violate that person’s rights, but once he or she refuses the discussion, “following and dogging” becomes annoying and borders on intimidation (quoting *Am. Steel Foundries*, 257 U.S. at 204)).

239. See *Hill*, 530 U.S. at 717-18 (applying the free passage into work rule (from *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 204 (1921)) to medical facilities).

240. See Westboro Baptist Church, FAQ, <http://www.godhatesamerica.com/ghfmir/main/faq.html#Who> (last visited Mar. 3, 2007) (explaining that the WBC perceives homosexual tolerance as a threat to America and that they protest in order to change America’s policies).

241. See Margie J. Phelps, *Lifting up an Ensign to the Nation: Showing the Signs to Bombastic Big Mouth Bastard President Bush*, WBC EPICS, May 29, 2006, [http://www.godhatesfags.com/featured/epics/2006/20060529\\_arlington-va-epic.pdf](http://www.godhatesfags.com/featured/epics/2006/20060529_arlington-va-epic.pdf) (recounting the WBC protest at Arlington National Cemetery on Memorial Day 2006).

242. See *Hill*, 530 U.S. at 708 (describing sidewalk counselors’ tactics, including conversation and distribution of literature).

right to communicate with the privacy interest.<sup>243</sup> Here, free speech wins out since, as described above, the picketers are not targeting individuals, but are staying in one spot. Because WBC does not follow or approach particular passersby, it would be quite easy for visitors to ignore the communication and continue walking. Therefore, any privacy interest hardly suffers when the right to communicate is granted.

The second relevant privacy interest comes from *National Archives & Records Administration v. Favish*.<sup>244</sup> There, the Supreme Court found that families of deceased persons have a privacy interest against public intrusions.<sup>245</sup> While such a general interest might appear to support a privacy interest in RAFHA, a closer look reveals the Court's intended meaning of this right. In fact, the right is defined quite narrowly, protecting only a family's right to make burial arrangements for the body and "to limit attempts to exploit pictures of the deceased family member's remains for public purposes."<sup>246</sup>

With regard to RAFHA's scope, this interest is irrelevant. The *Favish* Court based its privacy claim on families who wished not to have crime scene photographs of the deceased's corpse disclosed to the public.<sup>247</sup> That interest thus hinges on private information being publicly revealed.<sup>248</sup> The privacy claim at issue here protects no private information about the deceased or the family. Instead, the claimed interest seeks to protect the family's privacy by sheltering it from content being publicly expressed at a funeral on public property.<sup>249</sup> This is essentially the "dignity standard" as rejected in *Boos*. There, the Supreme Court reaffirmed that people must tolerate insulting and outrageous speech and that an interest in shielding

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243. See *id.* at 718 ("While the freedom to communicate is substantial, 'the right of every person "to be let alone" must be placed in the scales with the right of others to communicate.'" (quoting *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 738 (1970))).

244. 541 U.S. 157 (2004).

245. See *id.* at 167 (finding that such a right is supported by common law and cultural tradition).

246. *Id.*

247. See *id.* at 160 (defining the issues as (1) whether a privacy interest in criminal records and documents extends to the family where the family objects to disclosure of crime scene photographs and, if so, (2) whether the family interest in privacy outweighs the public interest in disclosure).

248. See *Collins & Hudson, Jr.*, *supra* note 108, at 66 (finding that familial privacy is irrelevant in funeral protests because no private information is being disclosed).

249. See *id.* (explaining that familial privacy does not protect against the public expression of views).

certain persons from speech with an adverse emotional impact is inconsistent with the First Amendment.<sup>250</sup>

Furthermore, families can hardly expect privacy while mourning in a public cemetery, especially those cemeteries that welcome up to four million visitors per year.<sup>251</sup> If privacy is of such importance to the families, they should limit their mourning to private churches, cemeteries, and homes.<sup>252</sup> Given this background, the privacy interest as submitted here simply is not a significant state interest.

Second, RAFHA is not narrowly tailored. The Court has defined a narrowly tailored regulation as one that promotes a substantial government interest that could not be achieved as effectively if the regulation were not in place.<sup>253</sup> Here, the government could equally achieve its interests by enforcing other rules already in place. Under Section 1.218 of Title 38, the Code of Federal Regulations already criminalizes most of the conduct addressed by RAFHA, such as disturbances, demonstrations, and distribution of handbills on property under the charge and control of the Department of Veterans Affairs, which includes the NCA.<sup>254</sup> Likewise, Arlington National Cemetery is protected under the Code, which sets out the visitor rules and prohibits certain disruptive conduct on cemetery grounds.<sup>255</sup> With such regulations in place, the government's interest in protecting the sanctity of the cemeteries is already served. In fact, the Superintendent of Arlington National Cemetery has said that the combination of these two restrictions has "adequately addressed potential demonstrations and disruptive behavior in the past."<sup>256</sup> The

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250. See *Boos v. Barry*, 485 U.S. 312, 324 (1988) (holding that a law prohibiting protests near foreign embassies and consulates was unconstitutional, despite an international agreement not to offend diplomats). But see *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 987 (E.D. Ky. 2006) (order granting preliminary injunction) (relying on the state interest in protecting citizens' right to participate in events without interference from others to find that there exists a significant state interest in preventing interference with funerals) (citation omitted).

251. See *supra* notes 136-139 and accompanying text (reporting the estimated number of visitors and interments per year at the Arlington National Cemetery and NCA cemeteries).

252. See *Collins & Hudson, Jr.*, *supra* note 108, at 66 (asserting that families seeking to avoid hateful speech so as to mourn in peace have the option of mourning in private churches, temples, funeral homes, cemeteries, and residences).

253. See *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (explaining that, while a regulation satisfies the narrow tailoring requirement where a substantial government interest would be achieved effectively without it, this standard does not mean that such a regulation may burden substantially more speech than necessary to achieve the government's interest) (citation omitted).

254. 38 C.F.R. § 1.218 (2006).

255. 32 C.F.R. § 553.22 (2006).

256. *Hearings*, *supra* note 148, at 98 (statement of John Charles Metzler, Jr., Superintendent, Arlington National Cemetery).



cemetery superintendent is probably the most qualified person to determine if the rules already in place were sufficient to prevent disturbance to visitors.<sup>257</sup> If the superintendent finds these less restrictive means of regulating speech to be sufficient, then the Court should likewise hold them to be adequate and find RAFHA unconstitutional because it is not narrowly tailored.

When seeking support for the Act in Congress, members of Congress largely relied on *Grayned v. City of Rockford* to demonstrate that the Act was constitutional.<sup>258</sup> In *Grayned*, the Court found a city's anti-noise ordinance, prohibiting willful making of noise or diversions near a school that tend to disturb class sessions, constitutional.<sup>259</sup> The Court noted three reasons for finding that provision to be narrowly tailored, which do not hold true for RAFHA.<sup>260</sup>

First, the *Grayned* Court found the provision to be narrowly tailored because it allowed for peaceful picketing adjacent to school grounds, so long as the demonstration was not noisy.<sup>261</sup> Here, however, the Act prohibits all picketing, noisy or not, within 150 feet of any road or path *leading to* the cemetery.<sup>262</sup>

Second, the Court held that the ordinance gave no opportunity for punishing based on the content of one's expression.<sup>263</sup> Yet, as

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257. See 152 CONG. REC. H2206 (daily ed. May 9, 2006) (statement of David F. Forte, Professor of Law, Cleveland-Marshall College of Law, before the Subcomm. on Disability Assistance and Mem'l Affairs, H. Comm. on Veterans' Affairs) (finding that a national cemetery superintendent maintains the cemetery and its activities so as to honor fallen service members); see also Kate Pickert, *A Field of Trees and Bones*, LOST MAG., Dec. 2005, <http://www.lostmag.com/issue1/treesbones.php> (explaining that the current superintendent grew up on Arlington National Cemetery property and observed many of the changes and difficulties since the age of four, as his father had also previously served as Arlington Cemetery superintendent).

258. See, e.g., 152 CONG. REC. H2202 (daily ed. May 9, 2006) (statement of Rep. Steve Chabot) (stating that RAFHA used almost the same language found to be constitutional in *Grayned v. City of Rockford*, 408 U.S. 104 (1972)).

259. See *Grayned*, 408 U.S. at 119 (finding that the law was not overbroad, but narrowly tailored).

260. See *id.* at 119-21 (holding that the ordinance was narrowly tailored because it punished only conduct that disturbed school sessions, gave no license to punish picketers for the content of their message, and imposed only a modest and reasonable regulation consistent with both the First and Fourteenth Amendments).

261. See *id.* at 119-20 (finding that this limitation was narrowly tailored, even though the ordinance may prohibit some picketing that is neither violent nor physically obstructive).

262. 38 U.S.C.A. § 2413(a)(2)(A)(i)-(ii) (West 2006); cf. *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 996 (E.D. Ky. 2006) (order granting preliminary injunction) (finding that a Kentucky law essentially identical to RAFHA was not narrowly tailored, in part, because it prohibited picketing or making any noise within 300 feet of a funeral whether or not funeral attendees could see or hear demonstrators).

263. See *Grayned*, 408 U.S. at 120 (noting that the ordinance prevented interference with the school's function without preventing peaceful picketing or giving license to punish picketers because of their message).

explained above in Part II.B.1 and below in Part II.C, RAFHA does punish based on content. Its enforcement is biased<sup>264</sup> and it gives license to cemetery officials to determine whether individuals may demonstrate on cemetery grounds, but provides no standards for who may be excused from the Act's restrictions.<sup>265</sup>

Third, the Supreme Court found that the ordinance imposed only a modest and reasonable regulation.<sup>266</sup> One example the Court cited in *Grayned* was that the provision was only effective during school hours and protesters could therefore demonstrate before and after hours as students and staff entered or left school grounds.<sup>267</sup> RAFHA, on the other hand, is effective for one hour before and after each funeral.<sup>268</sup> Since most guests probably arrive and leave within this time frame, it is quite likely that the majority of guests will not cross paths with the demonstrators. In fact, this time restriction is essentially a total restriction. While the NCA cemeteries conduct an average of two services per day,<sup>269</sup> Arlington conducts an average of twenty-eight.<sup>270</sup> Arlington only operates for either nine or eleven hours each day.<sup>271</sup> Therefore, there are likely two or three services each hour of operation. At least with regard to Arlington, then, the Act prohibits demonstrations at any time when it might be effective in reaching the intended audience.

Additionally, with a buffer zone of 300 feet surrounding cemetery property and 150 feet from any road or path leading to the cemetery,

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264. See *supra* notes 162-171, 182 and accompanying text (explaining how the Act does not apply equally to all demonstrators, but rather disfavors the WBC protestors in favor of patriotic speech).

265. See *infra* notes 288-297 and accompanying text (concluding that the Act permits official discretion that does not meet the acceptable standards for prior restraint, and that it is therefore facially unconstitutional).

266. See *Grayned*, 408 U.S. at 121 (analogizing the ordinance to similar ordinances in *Cox v. Louisiana*, 379 U.S. 536 (1965) and *Cameron v. Johnson*, 390 U.S. 611 (1968), where the Court held that the special nature of a place may warrant reasonable regulations of protected speech).

267. *Id.* at 107. Although another provision restricted picketing 150 feet from any school building for thirty minutes before and after school hours, the Court found that provision unconstitutional under the Fourteenth Amendment because it was content based and could not survive strict scrutiny. *Id.*

268. 38 U.S.C.A. § 2413(a) (2) (West 2006).

269. See DEP'T OF VETERANS AFFAIRS, *Facts About the National Cemetery Administration*, *supra* note 139 (estimating that the 123 NCA cemeteries bury more than 93,000 people per year).

270. See Arlington National Cemetery Visitor Information, Arlington National Cemetery Facts, *supra* note 133 (estimating that Arlington conducts about 6,400 funerals per year).

271. Arlington National Cemetery, Visitor Information, Hours, Access and Parking, [http://www.arlingtoncemetery.org/visitor\\_information/hours-parking.html](http://www.arlingtoncemetery.org/visitor_information/hours-parking.html) (last visited Mar. 2, 2007) (stating that the Cemetery is open to the public every day of the year from 8 a.m. until 7 p.m. in the summer months, and until 5 p.m. the rest of the year).

RAFHA is hardly modest or reasonable. In *Grayned*, the buffer zone for picketing was 150 feet from any building, not just the property.<sup>272</sup> In *McQueary v. Stumbo*,<sup>273</sup> the District Court for the Eastern District of Kentucky considered a state law almost identical to RAFHA and recently issued a preliminary injunction, in part because the 300-foot buffer zone around cemetery property would restrict too much speech.<sup>274</sup> Much like the law in that case, RAFHA's scope is too broad and likely burdens more speech than necessary to serve the state interests. As such, RAFHA cannot be deemed modest or reasonable, and certainly not narrowly tailored.

Finally, the Court asks whether there exist ample alternative channels of communication for the speaker to share his or her message. In *Frisby v. Schultz*,<sup>275</sup> the Supreme Court upheld an ordinance prohibiting picketing in front of someone's home because it left ample alternative channels for communication, including going door-to-door, marching through the neighborhoods, and contacting residents by phone or mail.<sup>276</sup> Here, however, these alternatives are inadequate because it is more difficult to identify the targeted audience's contact information.<sup>277</sup>

Unlike in *Frisby*, where protesters targeted specific doctors whose home addresses were easily obtained, cemetery protesters are targeting unidentified tourists from all over the country in addition to specific funeral-goers.<sup>278</sup> WBC believes that those visiting the cemetery or attending the service support America's policies because they honor those who have died for the country.<sup>279</sup> Additionally, going door-to-door and contacting by phone or mail are ineffective alternative channels when substituted for face-to-face

272. See *Grayned*, 408 U.S. at 107 (quoting the anti-picketing ordinance the Court invalidated because it only permitted picketing by those involved in labor disputes).

273. 453 F. Supp. 2d 975 (E.D. Ky. 2006) (order granting preliminary injunction).

274. See *id.* at 996 (explaining that a zone that large would restrict private property owners' speech, as well as the general public's communications on issues totally unrelated to the funeral).

275. 487 U.S. 474 (1988).

276. See *id.* at 483-84 (agreeing with appellants that such alternatives were sufficient).

277. Cf. *Strauss*, *supra* note 196, at 93 (discussing the decision in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), and arguing that listening to a comedian on the radio is more affordable and easier than, and therefore not comparable to, paying for an album or a ticket to a live show).

278. See *Frisby*, 487 U.S. at 476 (recounting the protesters' sidewalk demonstrations outside an abortion-performing doctor's home on several occasions); Westboro Baptist Church, About WBC, <http://www.godhatesfags.com/main/aboutwbc.html> (last visited Mar. 2, 2007) (explaining that the Church seeks to teach biblical doctrines to "all men" through peaceful picketing).

279. See *Rostow*, *supra* note 4 (elaborating on WBC's policies and beliefs).

communication.<sup>280</sup> Protesters who send mass mailings or conduct door-to-door distributions hardly receive the attention that results from face-to-face interaction since mailings are easily thrown out, but demonstrations are harder to ignore. Since the WBC has begun its campaign of demonstrations, it has received ample attention from the media as well as cemetery visitors.<sup>281</sup> The WBC could not have achieved such notoriety without interacting with the targeted audience in this way.

Another suggested alternative channel, the Internet, is likewise an insufficient alternative for three reasons. First, it isolates public officials from protesters' concerns, thus reducing opportunities for public debate.<sup>282</sup> Second, cyberspace cannot replace the powerful symbolism of actually being at a street protest with others.<sup>283</sup> Speech on the Internet shares few, if any, of the critical characteristics of public protests, which have a history of civil protest and are "cathartic, expressive, evocative, emotive, and meaningful to those who participate."<sup>284</sup> Finally, "the public square lives."<sup>285</sup> That is, while the public cannot commandeer the public square, it does depend upon streets, parks, and squares for visibility by the intended audience, including the media and politicians.<sup>286</sup> As the Court has admitted, confrontational and disruptive protests are critical to promoting change.<sup>287</sup>

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280. See *Hill v. Colorado*, 530 U.S. 703, 780 (2000) (Kennedy, J., dissenting) (finding that door-to-door distributions, mass mailings, and telephone campaigns are ineffective alternatives to interacting with women face-to-face outside of clinics); cf. Zick, *supra* note 84, at 648 (arguing that the Internet is an inadequate alternative because protesting in public is a uniquely effective and meaningful way of dispersing messages).

281. See, e.g., Westboro Baptist Church, Current WBC News, <http://www.godhatesfags.com/news/wbcnewsarchive.html> (last visited Mar. 2, 2007) (linking to hundreds of articles about the WBC funeral protests).

282. See Zick, *supra* note 84, at 647-48 (explaining that because public space is continually shrinking and being segmented into "non-places" such as malls and subways where First Amendment rights do not apply, it is more important than ever that public debate not be forced to the Internet).

283. See *id.* at 648 (theorizing that being physically present with masses of others is a critical aspect of public dissent since protests in public streets and squares continue to occur, despite the accessibility and simplicity of the Internet).

284. *Id.*

285. *Id.* at 649.

286. See *id.* at 649-50 (referencing recent protests against the war in Iraq, national political conventions, and presidential inauguration).

287. See *id.* (hypothesizing that the 1960s Civil Rights movement and Vietnam protests would have been hardly as effective had they been conducted in places effectively invisible to the public eye).

*C. Even if Able to Survive Both Strict and Intermediate Scrutiny, the Act is  
Nonetheless Unconstitutional Because it Provides for Unbridled Discretion  
by Government Officials*

First Amendment jurisprudence prohibits standardless prior restraint because it renders protected speech vulnerable to biased censorship.<sup>288</sup> The presumption of a prior restraint clause's unconstitutionality<sup>289</sup> is fully supported where certain safeguards are lacking.<sup>290</sup> For content-based regulations, a prior restraint provision must provide three stringent safeguards, while provisions in content-neutral regulations are required to meet two, weaker conditions.<sup>291</sup> RAFHA cannot stand as it provides for prior restraint and contains neither set of safeguards.

If the Court initially found that RAFHA constituted a content-based restriction, its prior restraint provision would have to: (1) permit restraint for only a specified, brief period; (2) provide for prompt final, judicial determination; and (3) impose on the censor the burden of initiating litigation and proving that the expression is

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288. See *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988) (explaining that "a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship"); *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938) (finding that an ordinance requiring a permit from the city manager was facially unconstitutional because it subjected the freedom of the press to license and censorship).

289. One circuit court opined that the presumption is weaker in nonpublic fora than in public fora. See *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1322-24 (Fed. Cir. 2002) (finding that no Supreme Court case applies the prior restraint doctrine to nonpublic fora and that prior restraint is merely a form of speech regulation, which would be permissible in a nonpublic forum since the government is already permitted to restrict speech there). For purposes of this Comment, it is assumed that the cemetery is a public forum and is therefore accorded the full weight of the presumption. See *supra* Part I.A. In *Griffin*, the Federal Circuit conceded that other circuits had invalidated regulations permitting standardless discretion in nonpublic fora. See *Griffin*, 288 F.3d at 1323 (citing *Sentinel Commc'ns Co. v. Watts*, 936 F.2d 1189 (11th Cir. 1991)). Additionally, the court admitted several paragraphs later that just because "the government may constitutionally impose content-based restrictions on speech in nonpublic fora does not insulate a regulation from an unbridled discretion challenge." *Griffin*, 288 F.3d at 1324 (citing *Plain Dealer Publ'g Co.*, 486 U.S. at 764).

290. See *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559-60 (1975) (citing *Freedman v. Maryland*, 380 U.S. 51, 58 (1965)) (reaffirming that a system of prior restraint does not violate the First Amendment only when: (1) the burden of instituting judicial proceedings and proving that the material is unprotected is on the censor; (2) the prior restraint is imposed for a specified and limited period of time, and only for the purpose of preserving the status quo; and (3) there will be a prompt final judicial determination).

291. See *supra* notes 99-100 and accompanying text (listing the elements of each standard); Edward L. Carter & Brad Clark, *Death of Procedural Safeguards: Prior Restraint, Due Process and the Elusive First Amendment Value of Content Neutrality*, 11 COMM. L. & POL'Y 225, 230-32 (2006) (recounting the rise and fall of prior restraint safeguards and explaining the Court's limitation of the *Freedman* test).

unprotected.<sup>292</sup> The statute's language provides for none of these three safeguards. Instead, the Act vests unbridled discretion in the cemetery superintendent or director without any mention of time restraints or judicial review.<sup>293</sup> As such, the Court should deem RAFHA unconstitutional.

If the Court instead found that RAFHA is content neutral, it likely still would find that it does not provide the minimum criteria required of a valid prior restraint provision. The first of two required safeguards in a content-neutral regulation is that it provides sufficient standards to guide an official's decision.<sup>294</sup> Explicit limits on officials' discretion is one key to preventing censorship.<sup>295</sup> Here, RAFHA vests unlimited discretion in public officials. The language of the statute prohibits all demonstrations unless the cemetery superintendent or director has approved it, but provides no guidelines for which demonstrations may be excepted from the Act's restrictions.<sup>296</sup> The second safeguard required to prevent abuse of official discretion is standards rendering the prior restraint subject to judicial review.<sup>297</sup> Again, RAFHA contains no such standards and thus fails the Supreme Court's established test.

The Act's sponsors relied heavily on the language in *Griffin* to convince Congress of its constitutionality.<sup>298</sup> There, the circuit court

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292. See *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 321-23 (2002) (finding the three *Freedman* procedural safeguards inapplicable in that case, which involved a permit requirement for various park activities, because the activities did not raise the same concerns about potential censorship as in *Freedman*).

293. 38 U.S.C.A. § 2413(a)(1) (West 2006).

294. See *Thomas*, 534 U.S. at 322-23 (holding that content-neutral regulations are not held to the three, strict *Freedman* safeguards, but must still provide sufficient standards to guide officials' decisions and render it subject to judicial review).

295. See *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 769-70 (1988) (explaining that an assertion by the government that officials only deny permits for certain legitimate reasons is insufficient where the text of the law lacks explicit standards).

296. 38 U.S.C.A. § 2413(a)(1).

297. See *Thomas*, 534 U.S. at 323 (finding that prior restraint standards in a content-neutral regulation must render it subject to judicial review).

298. See, e.g., 152 CONG. REC. H2202 (daily ed. May 9, 2006) (statement of Rep. Steve Chabot) (asserting that the Act is constitutional in light of *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309 (Fed. Cir. 2002)). One Congressman mistakenly asserted that the Supreme Court had decided *Griffin*, while it was actually a circuit court. See 152 CONG. REC. H2201 (daily ed. May 9, 2006) (statement of Rep. Silvestre Reyes) ("In *Griffin* . . . , the United States Supreme Court upheld the constitutionality of existing regulations that prohibit demonstrations on property under the control of the National Cemetery Administration."). In fact, he claimed the Court held that "[a]ll visitors are expected to observe proper standards of decorum and decency while on VA property. Toward this end, any . . . demonstration except as authorized by the head of the facility . . . is prohibited." See *id.* However, the circuit court was simply quoting this language from the statute under analysis. *Griffin*, 288 F.3d at 1315 (quoting 38 C.F.R. § 1.218(a)(14) (2001)).

upheld the standardless prior restraint provision for two reasons. First, asserting that the cemetery was a nonpublic forum and that the presumption of unconstitutionality is weaker in a nonpublic forum than in a public forum, the court found that the statute adequately rebutted the lower standard.<sup>299</sup> Second, relying on this conclusion as well as the nonpublic nature and function of cemeteries, the court found the superintendent's discretion reasonable.<sup>300</sup> However, the court mistakenly based this conclusion on the mere fact that a forum analysis is required in analyzing the constitutionality of speech restrictions.<sup>301</sup> The court confused the prior restraint doctrine for a piece of the forum analysis, which identifies the level of scrutiny to be used. Prior restraint, however, is indeed a separate, facial challenge.<sup>302</sup> In fact, the Supreme Court has concluded that such a facial challenge is allowed "whenever" a government official has unbridled discretion under a law, but did not distinguish between public and nonpublic fora.<sup>303</sup> In *Warner*, the district court held that the regulation fit perfectly within this definition and, applying the two-part test described above, found it unconstitutional.<sup>304</sup> Because *Griffin* was an erroneous application of the prior restraint doctrine, the Court should instead follow the analysis in *Warner* and find the Act facially unconstitutional.

#### CONCLUSION

No one has yet challenged RAFHA's constitutionality, although several local ACLU chapters have tested similar state laws. Should some group or individual take on RAFHA, the Supreme Court likely would find the statute unconstitutional.

To begin, the Act is content based. Not only was Congress's conception of the Act biased, but its enforcement is unfair, too. Even though most Americans would probably agree that the speech here is despicable and insulting, it is nonetheless protected under the First

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299. See *Griffin*, 288 F.3d at 1322-23 (finding that no Supreme Court case has applied the prior restraint doctrine to a nonpublic forum, and that the forum is an important factor in analyzing the constitutionality of a speech restriction).

300. See *id.* at 1324-25 (reasoning that a cemetery's commemorative and expressive roles support a finding that standardless prior restraint is reasonable).

301. See *id.* at 1323 (discussing the standard of analysis for restrictions in nonpublic fora).

302. See *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988) (identifying the prior restraint doctrine as a facial challenge under the First Amendment).

303. *Id.* (defining the doctrine's scope) (emphasis added).

304. See *Warner v. City of Boca Raton*, 64 F. Supp. 2d 1272, 1292-93 (1999) (holding that, under *Plain Dealer Publ'g Co.*, the regulation was subject to the facial challenge, but could not survive).

Amendment. As such, RAFHA is subject to strict scrutiny, but cannot meet that high standard because it is not the least restrictive means for achieving a compelling and narrowly tailored governmental interest.

Even if the Court instead finds the Act to be content neutral, it could not meet the intermediate scrutiny standard. RAFHA, although it may further a significant governmental interest, is not narrowly tailored. There are already statutes in place to serve the government's interest in protecting the character of cemeteries, and the Act here essentially bans demonstrations during most, if not all, visiting hours at Arlington National Cemetery. Moreover, it does not leave open ample alternative channels of communication.

Finally, RAFHA provides for standardless prior restraint. It vests in one individual the authority to decide who may demonstrate on cemetery property and who may not. However, without designated reasons for allowing demonstrations, the cemetery official may pick and choose arbitrarily, which likely would result in censoring certain viewpoints.

Our soldiers did not sacrifice their lives in the fight for democracy just to have the most important of all democratic rights, the freedom of speech, ignored in their honor. If we seek to honor America's fallen heroes, then we must do so by permitting speech—respectful or otherwise—even when it may be hardest to hear.